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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT AND
DANIEL B. BELGARDE,

Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

In *Oliphant v. Schlie, et al.*, the memorandum opinion of the United States District Court for the Western District of Washington, filed April 5, 1974, is unreported. A copy of that decision is at pages 48-52 of the Appendix. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 544 F.2d 1007 (9th Cir. 1976). It is reprinted in the Appendix at pages 55-73.

In *Belgarde v. Suquamish Indian Tribe, et al.*, the Report and Recommendation of the United States Magistrate, United States District Court for the Western District of Washington, dated August 1, 1975, is printed at pages 110-121 in the Appendix. The District Court's order adopting the Magistrates' recommendations in full, dated August 18, 1975, is contained in the Appendix at pages 122-123.

JURISDICTION

The judgment of the United States Court of Appeals was entered in *Oliphant* on August 24, 1976. Jurisdiction of this Court was invoked under 28 USC §1254(1).

In *Belgarde*, the United States District Court entered judgment on August 22, 1975. The record was filed with the Court of Appeals, *Belgarde v. Suquamish Indian Tribe, et al.*, 9th Cir., Cause No. 75-3319, and jurisdiction of this Court was invoked under 28 USC §1254(1) pursuant to Rules 20 and 23(a) of the Supreme Court.

QUESTIONS PRESENTED

I.

WHETHER NON-INDIANS WHILE ON THE PORT MADISON INDIAN RESERVATION IN THE STATE OF WASHINGTON ARE SUBJECT TO CRIMINAL LAWS PROMULGATED, ENFORCED AND ADJUDICATED BY THE SUQUAMISH INDIAN TRIBE OF THAT RESERVATION THROUGH ITS TRIBAL COUNCIL, POLICE AND COURT, FOR ALLEGED OFFENSES OF THOSE LAWS BY NON-INDIANS OCCURRING WITHIN THE BOUNDARIES OF THE RESERVATION, WHEN JURISDICTION OF THE TRIBE IS EXERCISED BY IT AS AN ORIGINAL INHERENT POWER OF ITSELF AS AN INDEPENDENT

SOVEREIGN NATION ACTING TERRITORIALLY WITHIN THE BOUNDARIES OF THE RESERVATION AND WITHOUT EXPRESSED AUTHORITY OF THE CONSTITUTION OF THE UNITED STATES, THE TREATY OF THE UNITED STATES WITH THAT TRIBE ESTABLISHING THE RESERVATION, THE LAWS OF THE UNITED STATES OR THE STATE OF WASHINGTON?

II.

WHETHER WHEN THE UNITED STATES, HAVING PLENARY POWER AND POWER BY LAW OVER CRIMES ON AN INDIAN RESERVATION FOR OFFENSES OCCURRING BETWEEN NON-INDIANS AND INDIANS, EXCLUDING THE JURISDICTION OF THE STATE WHEREIN THE RESERVATION IS LOCATED, PROHIBITS THE TRIBE BY EXPRESSION OR IMPLICATION FROM EXERCISING SUCH JURISDICTION CONCURRENTLY WITH THE UNITED STATES OVER THOSE OFFENSES OCCURRING WITHIN THE RESERVATION UNDER THE LAWS OF THE UNITED STATES AND THE UNITED STATES CONSTITUTION?

III.

WHETHER SUCH SOVEREIGN CRIMINAL POWER AND JURISDICTION THAT THE SUQUAMISH INDIAN TRIBE MAY HAVE HAD OVER CRIMINAL OFFENSES BY OR AGAINST NON-INDIANS IN THE STATE OF WASHINGTON TERMINATED BY THE LAWS OF CESSION OF THAT POWER BY THE UNITED STATES TO THE STATE OF WASHINGTON, COUPLED WITH THE ACCEPTANCE BY THE LAWS OF THE STATE OF WASHINGTON OF THAT POWER AND THE PETITION AND CONSENT OF THE TRIBE TO SUCH CESSION AND ACCEPTANCE OF JURISDICTION PRIOR TO THE EXERCISE OF SUCH POWER BY THE TRIBE?

IV.

WHETHER, IF SUCH CRIMINAL POWER AND JURISDICTION THE SUQUAMISH INDIAN TRIBE MAY HAVE HAD

OVER CRIMINAL OFFENSES BY NON-INDIANS HAD TERMINATED AS PROVIDED IN QUESTION 3. HEREOF, SUCH TERMINATION WAS RESCINDED UPON A SUBSEQUENT PROCLAMATION BY THE GOVERNOR OF THE STATE OF WASHINGTON PROVIDING FOR RETROCESSION OF THE CRIMINAL JURISDICTION OF THE STATE OF WASHINGTON TO THE UNITED STATES WITH LIMITATIONS THEREIN BY REFERENCE TO THE LAWS OF THE STATE OF WASHINGTON, AND THE ACCEPTANCE OF RETROCESSION BY THE SECRETARY OF INTERIOR OF THE UNITED STATES, LIMITING SUCH ACCEPTANCE TO THOSE LAWS AS PROVIDED IN THE GOVERNOR'S PROCLAMATION.

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(2) May 5, 1958 Letter of Request from Suquamish Tribe to Governor Rossellini Asking Washington to Assume Jurisdiction Over Port Madison ..... 60(a)
(3) May 15, 1958 Proclamation of Governor Rossellini Declaring All Persons on Port Madison Under Jurisdiction of State of Washington ..... 60(a)
(4) January 11, 1971 Resolution of Suquamish Tribe Declaring Intent to Have Jurisdiction Return to the United States ..... 61(a)

(5) August 16, 1971 Proclamation of Governor Evans Retroceding Jurisdiction Over Port Madison to United States Except as Provided Under Laws of 1963, Chapter 36, RCW 37.12.010 ..... 62(a)
(6) Secretary of Interior's Acceptance of Retrocession as Qualified ..... 64(a)
(7) Tribal Resolution No. 77-065 Excluding Non-Indians From Tribal Juries ..... 65(a)

REGULATIONS OF THE SECRETARY OF INTERIOR:

(1) 25 C.F.R. §11.1(d) ..... 66(a)
(2) 25 C.F.R. §11.1(e) ..... 66(a)
(3) 25 C.F.R. §52.7 ..... 66(a)

STATEMENT OF CASE

This is an appeal from the denial of habeas corpus relief to Mark David Oliphant and Daniel B. Belgarde, charged with violations of the Suquamish Tribal Law and Order Code. (A. 41, 42, 88, 90). Both men were arrested by tribal police within the confines of the Port Madison Indian Reservation, but only Oliphant's alleged violations occurred on tribal trust land. (A. 9, 48, 76, 77, 110, 111; *Belgarde* R. 111, 115). Petitioners are non-Indians and reside on the reservation. (A. 8, 48, 75, 108, 110; *Belgarde* R. 113).

Respondents are the Chief of Police for the City of Bremerton, Washington, the Secretary of Interior (Secretary), the Suquamish Indian Tribe, Chairman of the Suquamish Tribal Council, the Suquamish Tribal Manager, a tribal police officer, two tribal judges, and the Superintendent of the Western Washington Tribal Agency.[1] (A. 8, 27, 74).

[1] The Chief of Police and the Secretary were dismissed by the United States District Court. (A.49,113,122; *Oliphant* R.55,56; *Belgarde* R.36)

The statement of the case will be set out in the following format. First, a brief description of the Port Madison Reservation. Second, a synopsis of the pertinent federal, state and tribal governmental acts. Finally, the circumstances and prior proceedings in the matters at bar.

At this time the Court should be informed that the factual matters contained herein are presented in the light most favorable to Petitioners. Petitioners have consistently made and supported these factual allegations, and they have largely gone uncontested. Nevertheless, neither the United States District Court nor the Court of Appeals made thorough findings on these matters, and absent proof to the contrary in the record, Petitioners' statement of facts should be controlling.

A. Port Madison Reservation

The Port Madison Reservation is located on Puget Sound in Kitsap County across from Seattle, Washington. There are approximately seven thousand two hundred and seventy-six (7,276) acres within the reservation boundaries. (A. 29, 75). Forty-one acres are held as tribal community land of which thirty-six acres were leased in 1969 to a non-Indian corporation for a term of fifty years. (A. 29, 48). The remaining five acres of communal land are occupied by the terms of a lease with the American Legion, a "ballpark" and a cemetery. (A. 29). The other reservation property consists of roads and public highways maintained by Kitsap County and the State of Washington, allotted land belonging to Suquamish Indians, and land owned in fee simple by non-Indians. (A. 28, 75, 111). Of the total reservation property non-Indians own five thousand two hundred and thirty-one (5,231) acres, or approximately 67 per cent. (A. 29, 47, 75; *Oliphant* R. 53, Maps 4-7, R. 54, Exhibit 5; *Belgarde* R. 78, Exhibit A).

The Suquamish Indians have not had a tribal community at Port Madison for quite some time. (A. 27-29, 46, 75). Suquamish is the only town of any consequence and it is unincorporated. (A. 29). Suquamish is inhabited by Indians and non-Indians owning commercial and residential property in the town, and this property is zoned and taxed by Kitsap County. (A. 29, 46, 75; *Oliphant* R. 53, Maps 4-7).

Non-Indians at Port Madison are subject to the civil and criminal jurisdiction of Kitsap County and the State of Washington. (A. 24, 29, 30, 77, 110). Public facilities such as roads, schools and fire protection are maintained by the State of Washington or the County. (A. 29, 75, 111). The full discussion of the jurisdictional history of the area in the brief of Kitsap County is incorporated herein.

There are about fifty members of the Suquamish Tribe enrolled at Port Madison. (A. 30, 45, 75). By contrast there are almost three thousand (3,000) non-Indians residing on the reservation. (A. 30, 47, 75).

B. Synopsis

1855 Port Madison Indian Reservation established with the signing of the *Treaty of Point Elliott*, 12 Stat. 927 (1859). The treaty contained no expressed reference to tribal jurisdiction over non-Indians, but it did empower the President to allot tribal lands. (Appendix to brief pages 6a-12a).

1887 General Allotment Act passed, 24 Stat. 388 (1887). This law provided: tribal trust lands could be allotted to Indians; patents would eventually issue on the lands so allotted; Indians to whom patents were issued "shall have benefit of and be subject to the laws" of the state in which they reside; and United States citizenship was extended to Indians given patents to allotted land.

1889 Congress admits Washington to statehood, 25 Stat. 676 (1889). The enabling act provided that Washington should disclaim all jurisdiction over Indian country. Pursuant to the enabling act Article XXVI of the Washington Constitution disclaimed jurisdiction over Indian lands. The Washington Constitution also designated the state legislature to enact, amend and repeal state laws. RCW Const. Art. III; RCW Const. Amend. 26. (Appendix to brief page 32a).

1905 Second and last agreement between the Suquamish and the United States is signed, 33 Stat., 1078 (1905). (Appendix to brief page 12(a). This was not a treaty. It concerned cession of land and was in the nature of a contract between the United States and individual male members of the tribe; no chief or other official spoke for the Suquamish.

1910 By 1910 all reservation lands, except for forty-one acres of tribal trust land, were allotted to individual members of the Suquamish tribe. (*Oliphant* R. 53, Map 3.)

1916 First Suquamish Constitution passed. This was a simple instrument and did not address the question of tribal jurisdiction over non-Indians (Appendix to brief page 4a).

1934 Indian Reorganization Act becomes law, 48 Stat. 984 (1934). This act authorized reservation tribes to incorporate and function as local governmental units. Section 16 of the act licenses organizing tribes *with all the power vested in any Indian tribe by existing federal law,* 25 U.S.C. §§476 and 477 (Appendix to brief pages 16a-17a).

1953 Congress enacts Public Law 83-280, 67 Stat. 588 (1953). This law allowed certain states, like Washington, to assume exclusive criminal and civil jurisdiction over Indian reservations by constitutional amendment or legislative enactment; with other states, assumption of jurisdiction was mandatory. (Appendix to brief page 17a).

1957 Washington legislature passed Laws of 1957, chapter 240. (Appendix to brief page 19a). This statute authorized

the governor, by proclamation, to assume jurisdiction over Indian reservations if requested to do so by the respective Indian peoples.

1958 By unanimous vote of *twenty-one members,* the Suquamish Tribal Council passed a resolution asking the governor to assume jurisdiction over Port Madison. (Appendix to brief page 58a-60a).

1958 May 15, Governor Rossellini proclaimed, effective June 14, 1958, the Port Madison Reservation and *all persons* residing on it under the criminal and civil jurisdiction of the state of Washington. (Appendix to brief page 60a).

1963 Washington legislature amended in part and repealed in part Laws of 1957, chapter 240, with enactment of Laws of 1963, chapter 36. RCW 37.12.010 *et seq.* (Appendix to brief page 20a). With this amendment the legislature, without executive proclamation, assumed exclusive jurisdiction over *all persons* within Indian country, *except* Indians on trust lands where none of the following subject areas were involved: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon public streets. In other words, unless one of the eight subject categories was involved Washington did not assume jurisdiction over Indians on trust lands, but this was the only group of persons over whom jurisdiction was not assumed. The 1963 law also provided that tribes having previously come under state jurisdiction pursuant to the 1957 statute, *such as the Suquamish,* were not to be affected; i.e., they were to remain totally under state jurisdiction.

1964 Suquamish adopt the current tribal constitution and by-laws. (Appendix to brief pages 4a-6a). The constitution limits tribal membership to persons of Suquamish blood, and also vests governmental power in the tribal council. All

legislation is to be passed either by the tribal council, or by referendum in which only tribal members can vote. As of January 1974, there were only twenty-two Suquamish eligible to vote. (A. 46). *Non-Indians cannot become tribal members, they cannot vote and they are effectively excluded from tribal government.*

1965 The Suquamish Constitution was approved by the Secretary, and they became a federally recognized tribe under the Indian Reorganization Act of 1934. As approved by the Secretary, the tribal constitution authorized the tribal government to promulgate and enforce regulations *governing only certain conduct of tribal members.* This is found in section (h) of the constitution. (Appendix to brief page 5a).

1968 Indian Civil Rights Act passed, 82 Stat. 77 (1968). Among other things this law *permitted states* to retrocede to the federal government *all or any measure* of jurisdiction assumed over Indian country pursuant to Public Law 83-280. 25 U.S.C. §1323. This law also extended *certain due process* requirements to all persons subject to Indian tribes exercising powers of self-government, and limited penalties imposed by Indian tribunals to six months imprisonment or a fine of $500.00, or both. 25 U.S.C. §1302. (Appendix to brief pages 17a-19a).

1968 November 12, President Johnson, by executive order, designated the Secretary to accept any retrocessions by publication in the Federal Register of *the jurisdiction retrocede* and the effective date. Executive Order No. 11435, 33 F.R. 17339.

1969 Suquamish lease all their remaining tribal lands, except for 5 acres occupied by the American Legion, a "ballpark" and cemetery, to a non-Indian corporation for a term of fifty years. According to the terms of the lease, both parties had joint use of the "ballpark". (*Oliphant* R. 54, Exhibit 5; R. 53 Map 6).

1971 The Suquamish, *by unanimous vote of twenty-nine members,* resolve to have jurisdiction returned to the United States. (Appendix to brief page 61a-62a).

1971 Governor Evans, *without legislative approval,* proclaimed that any jurisdiction exercised by the State of Washington over Port Madison, "*except as provided under Chapter 36, Laws of 1963* (RCW 37.12.010 - 37.12.060, is retroceded to the United States." (Emphasis added) (Appendix to brief pages 62a-64a).

1972 The Secretary accepts the governor's retrocession *as qualified.* 37 F.R. 7353 (Appendix to brief pages 64a).

1973 April 1, the Secretary issues revised law and order regulations governing Indian reservations, 25 C.F.R. §§11.1 *et seq.* These regulations authorized tribes organized under the Indian Reorganization Act to adopt their own tribal codes. But the codes must comply with the tribal constitution, and they also have to be approved by the Secretary. *Id.* at §11.1(d) and 11.1(e) (Appendix to brief page 66a).

1973 Suquamish adopt their tribal Law and Order Code. (Appendix to brief pages 21a-47a). This code regulates conduct by Indian and non-Indian alike, and it covers a variety of offenses, everything from assault, bigamy and rape to theft. Defendants are entitled to a jury trial, but the Suquamish, by vote of *thirty-two members,* passed Tribal Resolution No. 77-065 to exclude non-Indian from the jury panel. (Appendix to brief page 65a). This code has never been approved by the Secretary.

C. Circumstances and Prior Proceedings

Shortly after enactment of the tribal code, on August 19, 1973, during a tribal celebration known as "Chief Seattle

Days",[2] petitioner Oliphant became involved in an altercation with another man. (A. 9, 41, 48). The incident occurred at the "ballpark" on tribal trust land. (A. 9, 48). Tribal police intervened, an officer was knocked down and Oliphant was arrested. (A. 9, 41, 42, 48).

The Law and Order Code had not been published or otherwise made available to non-Indians, and Oliphant had no knowledge of its existence. (A. 9, 79). Nevertheless Oliphant was arrested and locked in a room without food, heat, bed or toilet facilities for six hours before he was brought before a tribal judge. (A. 9, 41, 42).

Before the tribal court Oliphant, who was without counsel, was arraigned and charged with assaulting an officer and resisting arrest. (A. 9, 41, 42). At this hearing no presentation was made by either the tribal police or other witnesses as to the incident for which Oliphant was arrested. (A. 9). By order of the tribal court, in lieu of bail, Petitioner was transported to Bremerton, Washington[3] and incarcerated in the city jail.[4] (A. 9, 11, 48).

While he was being held at Bremerton, both Oliphant and his wife were visited by the Suquamish Tribal Manager and a tribal police officer who demanded that the Oliphants sign over title and possession to their automobile in order to secure Petitioner's release. The Oliphants refused. (A. 31).

[2] "Chief Seattle Days" was originally sponsored by the American Legion and everyone could participate. In 1973 the Suquamish Tribe took over the event and limited sponsorship and participation to Indian programs only. (A.46).

[3] Oliphant was transported to Bremerton in an automobile supplied or furnished by the Bureau of Indian Affairs. (A.9).

[4] By agreement entered into with the Bureau of Indian Affairs, Bremerton serves as a holding facility for the tribal court. (A.13). The United States funds the administration of justice on the Port Madison Reservation. 25 USC §§450 *et seq*; (*Oliphant* R.65, Exhibit 1).

Oliphant retained counsel and petitioned the United States District Court for the Western District of Washington for a writ of habeas corpus on August 23, 1973. (A. 8). August 24, Oliphant was released on his own recognizance after signing an agreement to appear. (A. 15, 38). It took the tribal court five days to determine that Oliphant had sufficient "family ties" in the community to release him on his own recognizance. (A. 15).

A supplemental petition was filed in federal court September 11, 1973. (A. 27). The tribal court stayed prosecution pending outcome of the habeas corpus action, and Oliphant still remains to be tried. (A. 49).

In his habeas corpus petitioners Oliphant alleged that the tribal court had no jurisdiction over non-Indians, and that subjecting him to the jurisdiction of the tribal court denied him due process as guaranteed by the United States Constitution.

United States District Judge Sharp entered an order to show cause (A. 39), and directed all parties to respond to the following subject:

1. Description of the various Indian lands, both Trust and non-Trust, involved in the present controversy and an analysis of their present status.
2. Description of the Suquamish Indian Tribe as presently constituted and the status of its members in relations to the lands in controversy.
3. Authority of the Suquamish Indian Tribe to promulgate its Code of Laws, * * *.
4. Description of federal or state statutes or regulations, if any, which have limited or restricted the sovereign power of the Suquamish Indian Tribe.

The matter came on for hearing and petitioner complied with the order to show cause. (A. 44, 47) (*Oliphant* R. 53, Maps 1-7). At the close of the hearing Judge Sharp denied the writ. A memorandum opinion and appropriate order were

subsequently entered, April 5, 1974. (A. 48, 53). In his memorandum opinion Judge Sharp found, *inter alia*, that Oliphant was subject to the jurisdiction of the tribal court, and that Petitioner had been accorded all the protections available to him under the Indian Civil Rights Act of 1968. (A. 52).

April 30, 1974, an appeal was taken, (A. 54), and on appeal Oliphant again alleged that the tribal court was without jurisdiction over non-Indians, and that subjecting him to the authority of a tribal government in which non-Indians had no participation violated his constitutional rights.

A panel of the United States Court of Appeals for the Ninth Circuit affirmed in a 2-1 decision, August 24, 1976. *Oliphant v. Schlie*, 544 F.2d 1007 (1976), The Circuit Court affirmed solely as to jurisdiction, and did not reach Petitioners' entire due process claim.[5] Judge Kennedy filed a dissenting opinion.

Petitioner Belgarde was arrested in the town of Suquamish on October 12, 1974. (A. 76, 110). According to the tribal police reports, Belgarde had been recklessly driving his pick-up at speeds "immensely exceeding the speed limit of 25 mph" on the streets of Suquamish for several hours with two tribal police cars in hot pursuit. (A. 107, 109, 110).

After a two hour "chase" the tribal police succeeded in blocking the road by pulling 20 feet in front of Belgarde as his truck slowed down to almost a stop. (A. 77, 107). Unavoidably, the pick-up collided with the police car. (A. 77). The officers emerged from their vehicles, fired a shot, pulled Belgarde and his companions from the truck and handcuffed them. (A. 77, 107, 108).

[5]The only finding the Court of Appeals made as to due process concerned exclusion of non-Indians from the venire. The Court reasoned this issue was raised prematurely, *supra* at 1011-1012.

Belgarde's companions were Mark Oliphant and Brad Bray. At that time Oliphant was awaiting appeal to the Ninth Circuit from the District Court's denial of his writ of habeas corpus. The tribal police released Oliphant and Bray, but they arrested Belgarde for recklessly endangering another person and injuring public property. (A. 77, 78, 108, 110).

The tribal officers then called the Kitsap County Sheriff. (A. 108, 111). A deputy sheriff arrived at the scene and called the State Patrol. (A. 108). The state patrolman arrived, conducted an investigation and made out an accident report. (A. 108, 111). Due to the tribal police officer's assertions of jurisdiction, neither the deputy sheriff nor the state policeman interferred in the matter. (A. 77, 108, 111).

Belgarde was taken to the tribal office in Suquamish where the officers filled out Temporary Orders of Commitment. (A. 77, 88, 90). A tribal judge had signed the blank orders, which are assertions that probable cause exists to arrest the defendant, prior to the incident, so the tribal officers merely completed them. (A. 78). According to these orders Belgarde was charged with destruction of *private property* and *"wreakless driving"*. (A. 88, 90). Pursuant to these orders Belgarde was transported sixty miles to Port Angeles, Washington and jailed.[6] (A. 78, 108, 111). He posted bail the same day and was released by the tribal court. (A. 78, 111).

Belgarde had to inform himself of the time set for arraignment. However, he appeared at the hearing on October 18, 1974 with an attorney. (A. 78, 111). The arraignment was held in the back of a former barber shop in an area roughly 8' x 10', not physically capable of handling a fair, free and public trial or hearing. The presiding judge appeared to have little knowledge, training or practice in law.[7] The remainder

[6]By compact entered into with the Bureau of Indian Affairs, Port Angeles also serves as a holding facility for the tribal court. (A.91).

[7]No transcript was made of these proceedings.

of the barber shop was occupied by the tribal police and other persons openly hostile to Belgarde. (A. 78, 79).

Belgarde was charged with endangering the life of another and destruction of public property. (A. 79, 111). The tribal court notified Petitioner's attorney that no one could appear as counsel for a defendant until he paid a fee to the tribal court and had been accepted by the "Chief Judge". (A. 79).

November 6, 1974, Belgarde filed a petition for writ of habeas corpus. (A. 74). The tribal court stayed further prosecution and Petitioner still remains to be tried. (A. 79, 111).

In his habeas corpus petitioner Belgarde contended that the tribal court lacked the requisite jurisdiction over non-Indians, and alleged, among others, the following denials of due process: (1) the law and order code had not been published and petitioner had no knowledge of it; (2) the tribal court facilities were not adequate for a fair public trial or hearing; (3) petitioner could not receive a fair trial because all the judges and jurors were Indians; (4) petitioner had not been timely advised of the charges against him; and (5) *petitioner could not be subject to the authority of a government in which non-Indians could not participate.*

The matter was assigned to a magistrate for findings and recommendations. (A. 93). An order to show cause was issued and the matter heard. (*Belgarde* R. 34, 76). The magistrate, relying heavily upon the District Court's decision in *Oliphant*, found the tribal court had jurisdiction notwithstanding the alleged violations having occurred on state and county highways. The magistrate proceeded to recommend that the writ be denied, and that the due process allegations were either frivolous or could be raised later in post conviction relief. (A. 110-121).

District Judge Sharp adopted the magistrates recommendations in full and denied the petition. (A. 122, 124). September 4, 1975, notice of appeal was filed (A. 125), and

the parties stipulated to hold the appeal in abeyance pending a decision in *Oliphant*, then before the Circuit. (A. 126). The Court of Appeals entered an order staying the appeal. (A. 128).

Following the Circuit's decision in *Oliphant*, the record in *Belgarde* was filed in the Court of Appeals, *Daniel B. Belgarde v. The Suquamish Indian Tribe et al.*, Cause No. 75-3319, and both defendants petitioned for a writ of certiorari and moved for leave to proceed in forma pauperis.

A writ of certiorari and leave to proceed in forma pauperis was granted June 13, 1977 (A. 129). In this posture the matter now stands before the Supreme Court.

SUMMARY OF ARGUMENT

The purported basis for the exercise of tribal criminal jurisdiction over non-Indians which is asserted by Respondents, and which was relied on by the court below, is the concept of "inherent tribal sovereignty." Under this concept, the tribe has all powers of government not expressly taken away by the federal government. The full range of such powers, once sovereignty is declared a valid basis for their exercise, is awesome. Moreover, the degree and nature of powers originally possessed by Indian tribes is quite unclear. In the present case, for instance, there is no evidence that the Suquamish Tribe was a sovereign entity exercising powers over non-members either before or after the relevant treaty.

The origins of the sovereignty concept are found in cases dealing with tribes such as the Cherokees, which stood in a much different position in their early dealings with the federal government than that of the tribes in the Treaty of Point Elliot.

The concept of independent tribal sovereignty is at odds with principles of international law. The tribes do not fit the

definition of sovereign states under that body of law.

Neither do the decisions of this Court hold that a notion of inherent sovereignty is a basis for tribal power. These decisions may be classified chronologically by dividing them into three eras. They may be classified as to subject matter by looking to the jurisdictional conflict presented. No relevant cases have been presented in which the conflict is between a tribe and a non-Indian, except those in which the tribe was relying not upon inherent power but upon a specific delegation of power in a statute or treaty.

In conflicts between the federal government and tribal governments, the cases have consistently held that the tribes are not foreign states with independent powers, but that they are dependent upon the federal government and fully subject to federal regulation. Initially, in what may be called the Marshall Era, the tribes were termed "domestic dependent nations." As the nation expanded westward, the United States exercised greater regulatory powers over the tribes, which exercise was upheld by this Court. It was consistently made clear in the decisions that the semi-autonomous powers of the tribes originated in treaties if they existed at all. Late in the nineteenth century, it was expressly held that there are, in the federal system, only two sovereigns—the federal government and the states. Modern cases remain consistent with this view.

Where the conflict was between the federal government and the states, this Court from the beginning has held that state jurisdiction is precluded only by preempting federal treaties and statutes, not by inherent tribal sovereignty. The role of the states expanded, as predicted in the early decisions of this Court, as the nation grew and as tribal lands were allotted to individual Indians. The cases upholding the increasing role of the states, especially as to reservation activities involving non-Indians, are inconsistent with the claim of tribal jurisdiction asserted here.

As well as being contrary to prior case law, the sovereignty concept advanced here by Respondents is contrary to the United States Constitution and statutes. No provision of the Constitution provides for tribal sovereignty. Further, the comprehensive statutory scheme enacted by Congress to govern criminal jurisdiction in Indian country precludes any finding of tribal jurisdiction over non-Indians, no matter what original basis for such jurisdiction is asserted.

Federal jurisdiction over crimes in Indian country is provided for by 18 U.S.C. 1152. Exceptions which allow for tribal jurisdiction are made in two types of cases in which Indians are defendants, and in cases in which jurisdiction is conferred upon the tribe by treaty. The present case does not fall within any of these exceptions, and there is, therefore, no tribal jurisdiction. The effect of section 1152 is corroborated by section 1153 of the federal criminal code. This section was passed to deprive the tribes of jurisdiction over Indian defendants accused of committing major crimes. Obviously, the tribes were not considered to have had any jurisdiction over non-Indian defendants, so this jurisdiction did not need to be divested.

The history of this federal legislation shows that the tribes were never given or considered to have jurisdiction over non-Indians. As early as 1799, the federal government took jurisdiction of non-Indian offenses against Indian persons or property. This jurisdiction was retained through successive acts regulating trade and intercourse with the Indians. In 1834, Congress rejected a bill which would have established a confederation of Indian tribes and given that entity concurrent criminal jurisdiction over non-Indians. Instead, Congress reenacted the essence of the earlier acts, leaving exclusive jurisdiction with the federal government. Interpretations of this legislation, from the year of its passage through 1970, by the United States Attorney General and the Department of the Interior, confirm that it removes from the

tribes any criminal jurisdiction over non-Indians they may have had.

The jurisdiction asserted by Respondents is also not conferred by the relevant treaty. The treaty is silent with respect to criminal jurisdiction over non-Indians, and this silence cannot be construed to confer such jurisdiction.

The jurisdiction conferred upon federal authorities by sections 1152 and 1153 is supplemented by the Assimilative Crimes Act, 18 U.S.C. 13. This comprehensive statutory scheme leaves no room for tribal jurisdiction over non-Indians. Finally, the exercise of such jurisdiction would also be a denial of due process.

The tribal code which purports to exercise jurisdiction over non-Indian offenders was not approved by the Secretary of the Interior. The criminal jurisdiction provisions of the code exceed the range of authority conferred upon the tribe by its constitution, which was approved by the Secretary. The code is also contrary to duly promulgated regulations of the Interior Department.

Finally, state jurisdiction over the present offenses was authorized by Public Law 280 and assumed by the State of Washington, and such jurisdiction has not been returned to the federal government.

I.

WHETHER NON-INDIANS WHILE ON THE PORT MADISON INDIAN RESERVATION IN THE STATE OF WASHINGTON ARE SUBJECT TO CRIMINAL LAWS PROMULGATED, ENFORCED AND ADJUDICATED BY THE SUQUAMISH INDIAN TRIBE OF THAT RESERVATION THROUGH ITS TRIBAL COUNCIL, POLICE AND COURT, FOR ALLEGED OFFENSES OF THOSE LAWS BY NON-INDIANS OCCURRING WITHIN THE BOUNDARIES OF THE RESERVATION, WHEN JURISDICTION OF THE TRIBE IS EXERCISED BY IT AS AN ORIGINAL INHERENT POWER OF ITSELF AS AN INDEPENDENT SOVEREIGN NATION ACTING TERRITORIALLY WITHIN THE BOUNDARIES OF THE RESERVATION AND WITHOUT EXPRESSED AUTHORITY OF THE CONSTITUTION OF THE UNITED STATES, THE TREATY OF THE UNITED STATES WITH THAT TRIBE ESTABLISHING THE RESERVATION, THE LAWS OF THE UNITED STATES OR THE STATE OF WASHINGTON.

INDEPENDENT TRIBAL SOVEREIGNTY

Suquamish Indian Tribe on the Port Madison Indian Reservation in the State of Washington

INTRODUCTION:

The States of Washington, Montana, and Idaho became states and were admitted to the Union in 1889. Washington was formed from the Territory of Washington under a Constitution framed by delegates chosen by the people of the territory.[8] It was one of the last States to be admitted to the Union within the continental limits of the United States; it

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[8] *Revised Code of Washington (RCW), Constitution.*

was formed during a period of migration and westward expansion following the Civil War, and western Indian wars.

The Treaty of Point Elliott was signed in 1855 and accepted, ratified and confirmed by the President of the United States in 1859 following a small battle that had occurred between settlers and Indians in the area now known as the City of Seattle, Washington.[9] In the treaty two special reservations were established for the use and occupancy of the 22 tribes and bands, including the Suquamish, consisting of two sections, each of 1,280 acres; one of those special reservations being Port Madison located across the waters of Elliott Bay approximately 8 miles from the City of Seattle.[10]The tribes and bands agreed in the treaty to settle upon the special reservations within one year.[11] A general reservation was established in the treaty, now known as the Tulalip Reservation, consisting of thirty-six sections in accordance with the view stated in Article III of the treaty:

> "* * * Of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade mountains in said Territory; * * *"

There are no restrictions in the treaty providing that the reservations were not in the Territory of Washington, then under the exclusive jurisdiction of the United States; there are no reservations of powers of government of any kind by the treaty tribes and bands in the treaty.

In Article XII the treaty provides:

> "* * * nor shall foreign Indians be permitted to reside in their reservations without consent of superintendent or agent."

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[9] *Treaty of Port Elliott* (1859), 12 Stat. 927 (Appendix to brief at 11a).

[10] Id Article II.

[11] Id Article IV.

It is thus assumed that, except as to Indian members of the tribes and bands that signed the treaty, the Suquamish had no powers of government to even permit alien Indians to reside on the reservation.

The total number of Indians of the tribes and bands signing the Treaty of Point Elliott (1859) is estimated to be not more than 1,455 and of those living on the Port Madison Indian Reservation in 1902 to be not more than 163.[12] Their livelihood was largely dependent upon fishing, the curing of fish, taking of shell fish, some hunting and the gathering of roots and berries. Their travelling was mostly by canoe. They had slaves, traded in Vancouver Island, Canada, outside the dominion of the United States.[13] There is scant knowledge of their culture, customs, ways and usages and no identification of any particular area of land individual tribes and bands occupied to the exclusion of others in the Washington Territory.[14]

Since the decisions in *Oliphant* and *Belgarde* declare historically that the Suquamish Indian Tribe was before and continues after the formation of the United States as an original, independent sovereign entity with powers of government territorially over persons and things on the Port Madison Indian Reservation, in argument for the Petitioners it is necessary to consider the following: (1) The concept of independent tribal sovereignty, its application to the Oliphant-Belgarde cases, extent of inherent powers of government which it proclaims, and its origin; (2) The validity of such a concept related to the Indian tribes under international law;

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[12] Kappler, Indian Affairs, Vol. I, 1044.

[13] Treaty of Point Elliott (1859) (Appendix to brief at 6a).

[14] Whoward, John, *United States v. Washington: A Last Stand for the Indians*? March, 1973, University of Washington Law Library: pages 4-8. Joseph, Alvin: The Indian Heritage of America, Alfred A. Knopf, 1968, pages 73-81.

(3) The relevant judicial decisions related to such concept; (4) The constitutionality of such a concept. In argument to QUESTION I, this is done under the following headings:

A. INDENTIFICATION OF CONCEPT OF INDEPENDENT TRIBAL SOVEREIGNTY

B. CONCEPT CONTRARY TO INTERNATIONAL LAW

C. CONCEPT CONTRARY TO JUDICIAL DECISIONS

1. INTRODUCTION
2. MARSHALL ERA: UNITED STATES V. TRIBES
   MARSHALL ERA: UNITED STATES V. STATES
3. EXPANSION ERA: UNITED STATES V. TRIBES
   EXPANSION ERA: UNITED STATES V. STATES
4. MODERN ERA: UNITED STATES V. TRIBES
   MODERN ERA: UNITED STATES V. STATES

D. CONCEPT CONTRARY TO UNITED STATES CONSTITUTION

The structure of the argument made follows and receives benefit from a review of tribal self-government made by Frederick J. Martone entitled: *AMERICAN INDIAN TRIBAL SELF-GOVERNMENT IN THE FEDERAL SYSTEM: INHERENT RIGHT OR CONGRESSIONAL LICENSES*, cited in the dissenting opinion of Justice Kennedy of the 9th Circuit in the *Oliphant* Case.[15]

It is asserted that a sense of *mea culpa* permeates public policy and some judicial decisions by taking out of context and remembering only the past subjugation of Indian tribes

[15] 51 *Notre Dame Lawyer* 600 (1976).

and bands and lands within the United States to the powers of the United States, without consideration of the benefits, rights, privileges and immunities received by all people within the United States under the Constitution, which otherwise could not have been. It is now argued that as to some non-Indians those rights, privileges and immunities while on an Indian reservation within the United States are being sacrificed by the application to them of the concept of independent Indian tribal sovereignty by the judicial decisions in the *Oliphant* and *Belgarde* cases.

A. Indentification of Concept of Independent Tribal Sovereignty

CONCEPT: The concept of independent Indian tribal sovereignty, upon which the decisions in *Oliphant* and *Belgarde* rest is: that a tribe, whose membership is limited to persons of common Indian ancestory, continues to have territorially all the domestic, independent, internal powers of government of a sovereign entity which the tribe of their ancestors had before the existence of the United States and after treaty with the United States – that are not otherwise expressly terminated by that treaty or acts of Congress (A-48, A-56, A-110). It assumes the tribe of their Indian ancestors existed originally as an independent sovereign state with internal, inherent powers of government over its own members, as well as non-members, territorially, within certain boundaries in which it asserted exclusively its rights to occupy, possess, and control. It then assumes that, regardless of discovery of their lands by European nations, war and conquest, the formation of the United States, a treaty with the United States and 200 years of United States history, that the *original independent sovereignty with inherent, internal powers of government over all persons and things continues*

within the area of the reservation created by the treaty. Such powers of government are therefore deemed to be original and not dependent upon any delegation of power from either the United States Constitution or the United States by way of treaty or acts of Congress – existing independently or concurrently with powers of the United States or of the State of Washington, and are unlimited territorially within the reservation – except as expressly denied by treaty or acts of Congress. APPLICATION TO OLIPHANT AND BELGARDE CASES: Application of the concept was made in the *Oliphant* and *Belgarde* decisions without proof or reference to any evidence that before the Treaty of Point Elliott was made in 1859, the Suquamish or any of the 22 tribes involved, was a sovereign entity exercising its governmental powers over its own peoples and other persons within a certain territory. The Respondents presented no evidence that after the treaty was made the Suquamish Indian Tribe existed on the Port Madison Indian Reservation as a sovereign entity and had exercised any internal domestic powers of government until passage by referendum vote of its members in 1973 of the Law and Order Code under which Oliphant and Belgarde were arrested.[16] Contrary evidence for the Petitioners is the fact that after the treaty was made the Suquamish Indian Tribe did not exist as a sovereign entity and did not exercise any powers of government over any of its own members or non-members of the tribe within the boundaries of the Port Madison Indian Reservation until 1973. (A-39, A-44).

When the Law and Order Code was promulgated as an act by the tribe of its original sovereignty to apply territorially within the reservation to its own members and non-members, no distinct community of its members lived on the reservation. Fifty to one hundred fifty members (adults and minors) lived on the reservation in scattered areas assimilated

[16] Law and Order Code, Suquamish Tribe (Appendix to brief 21a).

within a non-Indian population of approximately 2,928 residents. (A-44, A-47). Such evidence and lack of evidence was ignored in the decisions below, although it is material to the premises for the concepts of sovereignty and powers of government upon which the decisions were justified.

EXTENT OF POWERS UNDER CONCEPT: If one accepts the premise that a tribe is an independent sovereign entity or state with an origin of powers of its government not dependent upon either an origin or enumeration of those powers in its Constitution, a recognition of those powers in a treaty with the United States or a delegation of powers to it by acts of Congress of the Constitutional powers of the United States, it cannot then be argued that it does not have, necessarily, all unlimited internal powers of a sovereign state not of the union (not expressly limited by the treaty or acts of Congress) over persons and things within the territorial jurisdiction of the boundaries of the reservation as its membership may determine. Such powers may then exist concurrently with and not dependent upon whatever powers either the United States Government or the State of Washington may have over those same persons and things on a reservation.

Therefore it must be admitted an Indian tribe not only has the power to promulgate legislation, enforce the legislation by police action, and prosecute and adjudicate cases of criminal law territorially over all persons and things within the reservation for misdemeanors, but also for major crimes. A tribe therefore must have all those awesome civil and criminal internal powers of the United States Government constitutionally expressly enumerated and implied therefrom, exclusively or concurrently with that of states of the union, and those general powers of a State of the Union, limited or unlimited by the United States Constitution – otherwise not *expressly* limited by treaty or acts of Congress. Among such powers necessary to be included would be the power to raise

revenue by taxation and licensing of non-Indian persons and things on the reservation, zoning of lands,[17] regulation of business activity, and all other domestic powers of government (legislative, executive and judicial) though never exercised by the tribe before conquest and treaty with the United States, and not an exercise of powers by it in accordance with its own custom and usages for the protection of its own people. *The cart has been placed before the horse.* But the concept is false and unjustified.

FIRST FORMULIZATION OF CONCEPT: The first formulization of the concept was made in *Handbook of Federal Indian Law* first printed in 1940 or 1942 by the Department of Interior under the editorial supervision and direction of Felix S. Cohen.[18] In 1958 the Department of Interior published a book entitled: Federal Indian Law, acknowledging in the preface that it was a revision and updating of "Cohen's Handbook".[19]

The majority opinion of the Ninth Circuit in the *Oliphant* case affirmed the concept by citing *Worcester v. Georgia* and *Cherokee Nation v. Georgia*, stating:

> "Surely the power to preserve order on the reservation when necessary by punishing those who violate tribal law, *is a sine qua non of the sovereignty that the Suquamish originally possessed.* (A-) (Emphasis added).

[17] *Suquamish Tribal Community Ordinance* (Appendix to brief 47a).

[18] The *Handbook* has all but disappeared. It was republished without revision by the University of New Mexico, 1971, entitled: *Felix S. Cohen's Handbook of Federal Indian Law*, referred to as: "*Cohen's Handbook*".

[19] Federal Indian Law, Department of Interior, Oceana, 1958, referred to as: "*Federal Indian Law*". "*Cohen's Handbook*" in its Foreword refers to "Federal Indian Law" as a "vulgate version" * * * deteriorated into a volume with a new and constant theme: the Federal Government's power over Indian affairs is plenary."

Cohen's Handbook set forth the principle and concept in the following words:

> "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation."[20] (Section. Introduction p. 122) (Emphasis added).
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> * * * * *
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> "The whole course of judicial decision on the nature of tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

The major cases cited in support of the principle of inherent powers and the concept of independent tribal sovereignty in *Cohen's Handbook*[21] are *Worcester v. The State of Georgia*[22] and *Talton v. Mayes*,[23] both cases involving the

[20] *Cohen's Handbook*, 122.

[21] *Cohen's Handbook*, 122, 123, 124 and 125.

[22] *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515 (1832)

[23] *Talton v. Mayes*, 163 U.S. 376 (1896)

Cherokee Nation, and *Ex Parte Crow Dog.*[24] In conclusions on the subject of "The Derivation of Tribal Powers", Cohen's *Handbook* makes the following observation:

> "The extent, however, to which the foregoing principles may apply to scattered Indian groups which have never exercised powers of self-government presents questions to which no authorative answers have yet been given."[25]

Subsequent analysis of judicial decisions does not support the concept announced in Cohen's *Handbook.*[26] Comparison of the history of the people of the Cherokee Nation, the powers they asserted and the distinct lands they occupied finds no parallel with that of the Suquamish Indian Tribe.[27]

B. Concept Contrary to International Law

Though it may be admitted that some Indian tribes before conquest or treaty with the United States, and after treaty because of treaty language, preserved some elements of a domestic state or nation over their own internal domestic matters, it is contrary to the concept of a definition of a state that any Indian tribe is an independent sovereign state, not of the union, with internal powers of territorial jurisdiction over all persons and things of a domestic sovereign state within a reservation established by Congress, unless the treaty with the United States or subsequent acts of Congress expressly

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[24] *Ex Parte Crow Dog*, 109 U.S. 556 (1883)

[25] *Cohen's Handbook*, 126

[26] *Infra.* pages 35-72 hereof.

[27] Reid, *A Law of Blood, The Primitive Law of the Cherokee Nation*, N.Y. Univ. Press, 1970; Wardell, *A History of the Cherokee Nation*, Univ. of Okla. Press, Norman 1938.

granted such powers.[28] It is thus argued that the shoe must fit the horse, and not the horse the shoe, and it is the burden of the tribe to find in express language by treaty with the United States, acts of Congress or judicial decisions such territorial powers over all persons and things within a reservation.

The concept that an Indian tribe is a sovereignty–a legal entity of a state within a State of the Union and the United States retaining territorial jurisdiction with internal powers of a sovereign state over all persons and things within a reservation after conquest and treaty with the United States establishing a temporary area for their members' use and occupancy at the sufferance of the United States–does not accord with rules and principles of international law that were and are part of the law of the United States and appropriate for consideration.

Though the concept admits that tribes lack one of the three necessary elements of being a sovereign independent state: external powers, i.e. to engage in foreign relations (the name as States of the Union), it concludes that all other domestic internal powers of a state not of the union continue after conquest and treaty with the United States, without proof that before and after conquest or treaty with the United States the tribe existed as an entity, a state, with the other two necessary elements of the definition of a state in international law–*a defined territory and a population under the control of its government.* Pursuant to definition, these

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[28] *Restatement (Second) of Foreign Relations Law of The United States* §4 (1965) defines "state" as follows: " 'State' • • • means an entity that has *a defined territory and population under the control of a government and that engages in foreign relations.*"

two elements must exist before as well as after conquest and treaty with the United States.[29]

Language of the Treaty of Point Elliott of 1855 indicates that the Suquamish did not exist with such necessary elements before and after the treaty was made; proof of such existence after the treaty was made is absent in the record. The land established in the treaty for the area of the reservation was not formerly recognized in the treaty as being the land owned or occupied by a population of Suquamish Indians exercising powers of government over that area. The title to the territory of the reservation was ceded to the United States in the treaty; tribal lands of the Suquamish were not recognized as being for tribal use and occupancy as a state; tribal lands ceased to exist by terms for allotment provided in the treaty; allotment lands of individual members were sold and patents issued by the United States; a distinct community of Indians exercising powers of government, independent or dependent upon the United States, never existed on the Port Madison Indian Reservation after the treaty of 1855. Applying the principles of international law it is well to conclude that no such Indian tribe, having made a treaty with the United States in a language similar to the Point Elliott Treaty, has territorial jurisdiction within the boundaries of a reservation within a state of the union and

[29]Id. §94 defines the meaning of "Recognition" as follows: "(1) By an act of recognition, a state commits itself to treat an entity as a state or to treat a regime as the government of a state. §100 defines the "Minimum Requirements for Recognition of New State" by: "Before recognizing an entity as a new state, *the recognizing state is required to make a determination, reasonably based upon fact, that the entity* (a) *has a defined territory and population* (b) *is under the control of a regime that satisfies the minimum requirements for recognition as a government under §101;* (c) *has the capacity to engage in foreign relations;* and (d) *shows reasonable indications that the requirements of Clauses (a)-(c) will continue to be satisfied.*"(Emphasis added). Comment is made that this rule is a corollary of the definition of "state" in §4.

the United States over persons not members of the tribe and land and things not owned by the tribe, its members, or the United States.[30]

C. Concept Contrary to Judicial Decisions

1. Introduction

There are two dimensions to consider in the analysis and evaluation of whether judicial decisions support the concept of independent tribal sovereignty with inherent internal powers territorially over all persons and things within a reservation. One is the historical consideration of the particular treaty, the laws of Congress and the policy of the United States at the time judicial decision was made. The second dimension is to identify the relation of the interest of the parties involved to the dispute at hand.

The first dimension in this argument is historically divided into three periods: (1) *The Marshall Era* (Formation of the United States until December 29, 1935, Treaty With The

[30]Ibid: "§11. Territory Defined

The territory of a state consists of
(a) its land area;
(b) its internal waters and their beds;
(c) its territorial sea and the bed of the territorial sea; and
(d) the subsoil under, and (subject to the limitation indicated in §16) the air space above,(a),(b),and (c)";

"§17. Jurisdiction to prescribe with Respect to Conduct, Thing, Status, or Other Interest within Territory
A state has jurisdiction to prescribe a rule of law
(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and
(b) relating to a thing located, or a status or other interest localized, in its territory."

Cherokee Tribe, providing for emigration of the remaining Cherokees west of the Mississippi.)[31] (2) *The Expansion Era* (1835-1935: The end of Marshall Era to the Indian Reorganization Act of 1934).[32] (3) *The Modern Era* (1935 to the present time).

Within the Eras the second dimension requires division of disputes on reservations into three classifications:

(1) Disputes involving powers of Indian tribes over non-Indians (Tribes v. Non-Indians)

(2) United States powers over tribes or Indians (United States v. Indians)

(3) United States powers versus States powers over tribes, Indians and Non-Indians (United States v. States).

The second dimension of the 1st classification of judicial decisions can now be disposed of by stating there are no known decisions of where any Indian tribe exercised any kind of powers of government over a non-Indian that were not derived by either express language authorizing such powers in a treaty with that Indian tribe, a delegation of the powers of the United States by acts of Congress and/or authorization for the exercise of such powers by orders through the President of the United States.

The majority opinion of the 9th Circuit in the *Oliphant* case used one of such cases to support its reasoning of original sovereignty of an Indian tribe having inherent powers

[31] Dec. 18, 1935, *Treaty With The Cherokee Tribe*, 7 Stat. 478

[32] *Indian Reorganization Act of 1934*, ch. 216, 45 Stat. 1185, 25 U.S.C. §461 *et seq.* (1790) (Appendix to brief 16a).

to tax non-Indian residents by citing *Buster v. Wright*, 8 Cir., 1905. (A. 56, 57), disregarding the distinguishing facts.[33]

The Respondents in the return to the Petition for Writ of Habeas Corpus, although acknowledging that the case of *United States v. Mazurie*[34] involved a delegation of authority by Congress (Act of Aug. 15, 1953, 67 Stat. 586, 18 U.S.C. §116) of powers of the United States on the Wind River Reservation to the Wind River Tribes to adopt local option legislation for sale of retail liquor on the reservation, used that case as support for the criminal powers of the Suquamish over Belgarde omitting facts crucial to the opinion of the Court. (A. 100, 101, 102).

The Report and Recommendation of the United States Magistrate relied in the Belgarde case upon *Ortiz-Barraza v. United States* to support its recommendation of extending the Oliphant concept of independent sovereignty territorially within the Port Madison Reservation to state highways (A. 114, 115) by stating: ***"But the significant point is that the

[33] *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed 203 U.S. 599 (1906). The tax involved was a non-compulsory tax for the privilege of non-citizens of the Creek Nation doing business on *fee patent land* of the Creek Nation authorized by Congress (March 1, 1901) (chapter 676, 31 Stat. 861, 866 §§ 10-16). The Creek Nation was guaranteed full jurisdiction of its government by such act and by treaty of 1832 (7 Stat. 368, art. 14), of Aug. 7, 1856 (11 Stat. 703, art. 15), and of June 14, 1866 (14 Stat. 788, art. 10). 135 F. 949,950,952,953.

[34] *United States v. Mazurie*, 419 U.S. 544 (1975) The Mazuries were convicted of a violation of United States Law in federal court, not a tribal court.. 18 U.S.C. §1154 Federal officers enforced the law. This Court clearly distinguished from the concept of independent tribal sovereignty by stating: "*We need not decide whether this independent authority is itself sufficient for tribes to impose Ordinance 26.* It is necessary only to state that the independent authority is quite sufficient to protect Congress's decision to vest in tribal councils this portion of its own authority to regulate Commerce *** with the Indian tribes". (Emphasis added).

court held [*Ortiz-Barraza v. United States*] the territorial jurisdiction of the tribe and of its police, was the same on a state highway as on the balance of the reservation."[35]

This then leaves for consideration the judicial decisions in the Marshall, Expansion, and Modern Eras to the two classes of cases related to United States v. Indians and United States v. States. Before commencing it is difficult to reason that the concept of independent tribal sovereignty with inherent internal powers can be said not to be dependent upon delegation of powers of treaty, acts of Congress, or authorization by orders of the President of the United States, the executive and judicial branch of the Federal Government, but yet said to exist because of decisions of the judicial branch. But that is not so; the very existence of the concept is dependent for its origin and its continuance upon the decisions of this Court when interpreting the Constitution of the United States, treaties with tribes, acts of Congress and executive orders to determine both the validity of the existence of such sovereignty, the extent of its powers, and the constitutional means by which powers are to be exercised.

The decisions of this Court do not support the concept. Before analysis of the two classes of cases in the eras stated, it is obvious to note, although the Respondents may otherwise argue, that the establishment, extent and continuance of the exercise of the powers of the Federal Government

[35] *Ortiz-Barraza v. United States*, 512 F. 2d 1176 (9th Cir., 1975). Significantly the Magistrate recognized that the case involved a prosecution under federal law and not tribal law, but failed to note that the opinion declared the arrest by an Indian police officer of a non-Indian distinguished the power of the tribe over a non-Indian by stating: "It has at times been held that tribes may not exercise criminal jurisdiction over non-Indians. *Ex Parte Kenyon*, 14 Fed. Cas No. 7720 (1887). Such holdings, if presently valid have not deregated from the sovereign power of tribal authorities to exclude trespassers who have violated state or federal law by delivering the offenders to the appropriate authorities".

in either relation to Indian tribes and Indians, or to States of the Union territorially within a reservation in judicial decisions *do not* define, establish, or extend the powers of a tribe as an independent sovereignty with inherent powers territorially over all persons and things on a reservation. This is particularly so in relation to non-Indians.

C. Concept Contrary to Judicial Decisions

2. Marshall Era: United States v. Tribes

In the era of Chief Justice Marshall two cases were decided in chronological order, the first deciding the nature of ownership of tribes to lands in the United States outside of a State of the Union declaring a principal humanitarianism that the tribes were to be protected *Johnson v. M'Intosh* (1832).[36] M'Intosh had received title from the United States and Johnson had received title by heirship from predecessors who had received title from tribes. After determining that it was an established principle among European nations that discovery gave title to the lands inhabited by Indians to the European government by whose subjects, or by whose authority, discovery was made, the only opinion, written by Chief Justice Marshall, went on to say:

> "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; *but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to*

[36] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it". (Emphasis added)[37]

The Court decided that as a result of the revolutionary war and treaty with Great Britian the *discovery rights and powers of government* of Great Britian over the lands inhabited by the Indians *became that of the United States,* that conquest of Indian lands was maintained by force as far West as the Mississippi and then in dicta declared the alternative choices: assimilation of Indians by the conqueror or separation and governed by the conqueror, as follows:

> "*When the conquest is complete, and the conquered inhabitants can be blended with conquerors, or safely governed as a distinct people,* public opinion, which not even *the conqueror* can disregard, imposes these restraints upon him; and he *cannot neglect them without injury to his fame, and hazard to his power******[38]
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> * * * * *
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> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained, if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. *So, too, with respect that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in possession of their lands, but to be deemed incapable* of transferring the absolute title to others." (Emphasis added).[39]

In *Cherokee Nation v. The State of Georgia* (1831),[40] direct issue was presented of the concept of independent

[37]Ibid. 574

[38]Ibid. 589,590

[39]Ibid. 591

[40]*Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1 (1831)

sovereignty of The Cherokee Nation as being a jurisdictional party-plaintiff as a "foreign state" for the Supreme Court to have original jurisdiction in an action to enjoin the State of Georgia under article three, second section of the Constitution enumerating and extending the Court's jurisdiction to "controversies between a state or the citizens thereof, and *foreign states,* citizens or subjects." (Emphasis added).

In familiar arguments *the Cherokee nation argued that it was a sovereign and independent state before the United States,* that they have been and are the sole and exclusive masters of their territory, with rights of self-government in accordance with their own laws, usages, and customs, and they are not subject to the principle of discovery and conquest to which they did not assent as an aggregate of aliens to the United States and a "foreign state". They interpreted the treaties with the United States as a recognition and guarantee of such status to territorial occupancy of their lands and independent sovereignty as a "foreign nation", rather than a grant of a right of occupancy of territorial lands from the United States, or a continuance of sovereign status dependent upon such treaties and acts of Congress.[41]

The majority opinion written by Chief Justice Marshall concluded that the Cherokee nation was not a "foreign state" and therefore was not a proper party-plaintiff to give the United States Supreme Court original jurisdiction.

The majority opinion recognized that because of the past history of the tribe, numerous treaties with the United States and laws of the United States enacted in the spirit of those treaties that the Cherokee nation had the status of a sovereign state not of the union.[42]

[41]Ibid. 3,4,5,6

[42]Ibid. 16

Then after stating that Indian territory is within the United States; that an attempt of a tribe of commerce or intercourse with foreign nations is considered under the jurisdiction of the United States; that the United States has sole and exclusive right of regulating their trade and commerce and managing their affairs; that their land in treaties were ceded to the United States and they had only a limited right to occupy certain lands; that in the treaty they acknowledged their dependence, the majority opinion concluded:

> "****They may, more correctly, perhaps, be dominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian****
>
> They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility." (Emphasis added).[43]

Justice Johnson in a separate opinion concluded that they did not have the sovereign status of a state: "They never have been recognized as holding sovereignty over the territory they occupy".[44] After examining history and concluding that before treaty their society was never connected by a "semblance of organic government"[45] that they are not recognized by any foreign states as a state; that there is no proof that they had been recognized in treaties as a state, but

[43]Ibid. 17, 18

[44]Ibid. 22

[45]Ibid. 22

rather they had renounced in treaties almost every attribute of sovereignty; *that subsequent to the treaties they organized themselves into organized government,* (compare with actions of Suquamish Indian Tribe) but "others" have the right to be consulted on admission of new states, he stated:

> "However, I will enlarge no more upon this point; because I believe, in one view and in one only, *if at all, they are or may be deemed a state, not a sovereign state,* at least while they occupy a country within our limits. *Their condition is something like that of the Israelites, when inhabiting the deserts.* Though without land that they can call theirs in the sense of property, *their right of personal self-government has never been taken from them;* and such a form of government may exist though the land occupied be in fact that of another." (Emphasis added).[46]

Justice Baldwin in the Cherokee case, after a lengthy examination of the historical trace of Indian affairs; cession of Indian lands by states to the United States for future creation of new states of the union; creation of the northwestern territory and subsequent treaty concluded:

> "****that Indian affairs formed no part of the foreign concerns of the government, and *that though they were permitted to regulate their internal affairs in their own way, it was not by any inherent right acknowledged by congress or reserved by treaty, but because Congress did not think proper to exercise to sole and exclusive right, declared and asserted in all their regulations* from 1775 to 1788, in the articles of confederation, in the ordinance of 1787, and the proclamation of 1788; which the plaintiffs solemnly recognized and expressly granted by the treaty of Hopewell in 1785, as conferred on Congress to be exercised as they should think proper." (Emphasis added)[47]

[46]Ibid. 27

[47]Ibid. 40

Then, *after examination of the Constitution* with the above-quoted conclusion as a background, *Justice Baldwin then turned to the subsequent assumptions of powers by the Cherokees after the Constitution of the United States* and wrote:

> "*****judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have acted for fifty-five years; and force, by mere judicial power, upon the other departments of this government and the states of the union, the recognition of the existence of nations and states within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions.* It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and Union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown, unacknowledged by any department of government; denied by all through all time; unclaimed till now; *and now declared to have been called into exercise, not by any change in our constitution, the laws of the union or the states; but pre-existent and paramount over the supreme law of the land.*" (Compare with acts of Suquamish Indian Tribe) (Emphasis added).[48]

Justice Thompson in the Cherokee case, dissenting and concluding that the Cherokee Nation was a "foreign nation", sovereign and independent, distinguished it from tribes, such as tribes like the Suquamish, in stating:

> "*This remark* [conclusion of independent sovereignty of Cherokee nation] *is to be understood, of course, as referring only to such as live together as a distinct*

[48]Ibid. 49, 50

> *community, under their own laws, usages and customs;* and not to the mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country; their national character extinguished; and their usages and customs in a great measure abandoned; self-government surrendered; and who have voluntarily, or by the force of circumstances which surrounded them, gradually become subject to the laws of the states within which they are situated." (Compare with Suquamish Indian Tribe) (Emphasis added).[49]

In substantiation of finding independent sovereignty, excluding the jurisdiction of the state of Georgia, Justice Thompson noted the treaty of Hopewell provided that should any Indian *or other person* commit a capital crime *against a citizen of the U.S.* the tribe agreed to surrender the offender to U.S. authorities for prosecution. Also it was noted that crimes by citizens of the United States against Indians or Indian property were to be punished by the laws of the state and were to be proceeded against the same as if the offense had taken place in the state in which the Indian country was located. *Treaty of Holston*, July 2, 1791, 1 Laws U.S. 327.[50] Thus Justice Thompson in dissent traced independent sovereignty to treaties to exclude the powers of the state.

C. Concept Contrary to Judicial Decisions

2. Marshall Era: United States v. States

The unique relationship of the domination of the United States over Indian tribes and their people for their protection and welfare in continuance of the humanitarian policy after discovery, conquest and wars announced by

[49]Ibid. 59, 60

[50]Ibid. 60,61,62

Chief Justice Marshall in *Cherokee v. State of Georgia*[51] was continued for their protection in *Worcester v. State of Georgia* (1832)[52] and became the cornerstone thereafter to the present date for the concept of Indian tribal sovereignty being used to establish the plenary exclusive powers of the United States Government for the protection of Indians and Indian tribes from the power of the states.

In *Worcester v. The State of Georgia*, the concept of independent tribal sovereignty was not at issue. The issue was the constitutionality of legislation by the State of Georgia within the reservation to directly terminate the rights of occupancy of the Cherokee nation and their people to occupy certain lands within the State of Georgia granted in treaties with the United States; to control their commerce with non-Indians entering and residing on the reservation; to terminate their government and to control the entrance and activity of any outsider on their land without license – including Worcester, a missionary from the state of Massachusetts, from entering their lands to preach the gospel by authority of the President of the United States.

Worcester v. The State of Georgia is therefore not support for the tribal sovereignty concept, but when coupled with *Cherokee v. The State of Georgia*, indicates that this concept had been rejected and, thus, authority as to any existence of sovereignty of a tribe was dependent upon:

1. The constitutional enumerated power of the United States exercised by treaty with an Indian tribe;
2. The constitutional enumerated power of the United States exercised by acts of Congress under the Commerce Clause;
3. Title to the land or territory being within the jurisdiction of the United States Government;

[51] Supra.

[52] *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515 (1832)

4. Policy of humanitarianism in the expression of the guardian-wardship doctrine of Chief Justice Marshall in the Cherokee case dependent upon a distinct community occupying certain lands within the United States subject to a government for the protection of their people.

The acts of the legislature of the State of Georgia were thus examined and Chief Justice Marshall, material to this case, remarked:

> "****The *Extra-territorial power* of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction." (Compare with Suquamish Indian Tribe) (Emphasis added).[53]

* * * * *

Further quotations from the opinion of Chief Justice Marshall support the above conclusions:

> "****The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected."[54]

* * * * *

> "****That instrument [Constitution of the United States] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.[55]

[53] Ibid. 541,542

[54] Ibid. 552

[55] Ibid. 558

* * * * *

"******The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, if, by our Constitution and laws, vested in the government of the United States*". (Emphasis added).[56]

* * * * *

"*****If the review which has been taken to be correct, and we think it is, *the acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.*" (Emphasis added).[57]

Justice M'Lean in *Worcester v. State of Georgia*, concurring in the opinion prophetically stated:

"*****But the inquiry may be made, is there no end to the exercise of this power over Indians within the limits of a state, by the general government? The answer is, that, in its nature, it must be limited by circumstances.

If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them****

The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government, in the extinguishment of their title, and especially by the compact with the state of Georgia. *But, a sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or eventually consent to become amalgamated in our political communities.*

[56]Ibid. 560

[57]Ibid. 561

At best they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; *and their existence within a state, a separate and independent community, may seriously embarrass or obstruct the operation of state laws.* If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority." (Emphasis added).[58]

C. Concept Contrary to Judicial Decisions

3. Expansion Era: United States v. Tribes

Subsequent judicial decisions in the age of expansion did not diminish the constitutional territorial powers of the United States Government in "Indian Country" in relationship to that of powers of the tribe. During the expansion period territories of the United States were established subject to the laws of the United States in Indian Country. Some Indian tribes' rights of occupation to lands within states were terminated by relocation of the tribes.[59] States were created

[58]Ibid. 592,593

[59]Wardell, *A Political History of the Cherokee Nation*, Univ. of Okla. Press, Norman 1938, p. 348: The last election of the chief of a powerful tribe of Indians was in many respects the climax of a series of tragedies. For nearly three-quarters of a century this Nation had suffered divisions, wars, and desolation:** Now the mockery of a one-time glorious event was about to be enacted – an executive must be chosen to close the business of a fallen republic**** The passing of an Indian state was but another step in the direction of a larger Union of American commonwealths.

from territories of the United States. The civil war between the states took place; rights of homestead were granted on public lands in Indian Country; migration and settlement of non-Indians in Indian Country took place in territories west of the Mississippi resulting in Indian wars, peace treaties, and confinement of tribes to reservations under a policy of "Manifest Destiny." Tribal lands were extinguished by allotment in severalty to individual Indians and surplus sales to non-Indians on reservations under a policy of termination of tribal status and assimilation of Indians into the society of American citizens took place by treaties and the General Allotment Act of 1887.[60] Finally within all continental boundaries of the United States there was established 48 states with general sovereignty of states of the Union under the United States Constitution. All during that period of time, the only Supreme Court judicial decisions involved the criminal jurisdiction of the right of power of an Indian tribe as a matter of self-government to legislate, prosecute, adjudicate and punish a defendant according to their laws for an offense taking place in Indian Country. That right was sustained where offenses involved an Indian against an Indian, or members of the same tribe, or occurred on trust lands of the United States. More important, the decisions rested upon the Court's determination of whether such power existed as a matter of interpretation of treaties and acts of Congress and not as a matter of independent self-government.

Talton v. Mayes (1896) is one of those cases first cited by Cohen's *Handbook* to be in support of the principles and concept that he formulated.[61] The defendant, a Cherokee

[60]Martone, *American Indian Tribal Self-Government In The Federal System; Inherent Right of Congressional License*? 51 Notre Dame Lawyer 600, 605, 606, 607; D. Otis, The Dawes Act and The Allotment of Indian Lands (1973).

[61]*Cohen's Handbook*, 123 *Talton v. Mayes*, 163 U.S. 376 (1896)

Indian, was charged, prosecuted, and sentenced to death pursuant to legislation, enforcement, trial and punishment of the Cherokee Nation. The treaty of 1835, 7 Stat. 478, with the Cherokee Tribe specifically provided that the land of the Cherokees would not be included within the limits of the jurisdiction of a territory or state and that they could make such laws as they deemed necessary for the protection of their people excluding, however, citizens of the United States that travel or reside in Indian Country by permission of the United States.

The defendant claimed the rights of the 5th Amendment of the United States Constitution in that he had not been tried by a fair and impartial jury. Before the Court was the issue of whether the powers of the tribe came from the Constitution as local powers of the Federal Government. The Court ruled that they were independent powers of self-government not arising under the Constitution of the United States or from powers of the Federal Government and the 5th Amendment did not afford the Indian defendant protection.[62]

Suffice it to say that Justice White who wrote the opinion used *Worcester v. The State of Georgia* as a sword against the claim of rights of an Indian defendant to the 5th Amendment instead of a shield against state powers with the inference that the powers of self-government were not dependent upon the treaty powers of the tribe.[63]

The Court concluded where the power of the Cherokee Nation came from by stating:

> "*By treaties and statutes of the United States the right of the Cherokee nation to exist as an autonomous body,*

[62]Ibid. 382

[63]Ibid. 383. The Court quoted *Cherokee Nation v. The State of Georgia*, where the majority agreed the Cherokee Nation was a state (See Footnote____) and *Worcester v. The State of Georgia* (See Footnote ____) supra.

subject always to the paramount authority of the United States, *has been recognized.* And *from this fact* there *has consequently been conceded to exist in that nation power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the nation.*" (Emphasis added.)[64]

Before the close of the 19th century there remained two companion cases to consider as to the concept of Indian tribal powers on a reservation in relationship to the powers of the United States. The first is *Ex Parte Crow Dog* (1883),[65] and the second, *United States v. Kagama* (1886).[66] Each case involved the murder by one Indian of another Indian of the same tribe, the first case members of the Sioux tribe in Territory of Dakota, and the second members of Hoopa Valley Reservation in the State of California. As a result of the decision in *Ex Parte Crow Dog* which determined the exemption provided by the Trade and Intercourse Act of the application of the laws of the United States to crimes between Indians in Indian Country,[67] the Major Crimes Act was passed which then came to test in the *Kagama* case.[68]

The Indian defendant in *Ex Parte Crow Dog*[69] relied on the exemption stated in the statute. The federal prosecutor, to uphold the conviction of the federal court, became involved in a "Catch-22" argument by arguing that the exemption did

[64] *Talton v. Mayes*, 163 U.S. 376 (1896), 379, 380

[65] *Ex Parte Crow Dog*, 109 U.S. 556 (1883), cited in *Cohen's Handbook* for support of the concept at page 124.

[66] *United States v. Kagama*, 118 U.S. 375 (1886)

[67] *Trade and Intercourse Act*, 18 USC §1152, (Appendix to brief, 14a, 15a).

[68] *Major Crimes Act*, 18 USC §1153, (Appendix to brief, 15a).

[69] *Ex Parte Crow Dog*, 109 U.S. 556(1883) 568, 569.

not apply because of treaty language that provided: "bad men among the Indians" were to be delivered to the United States to be tried and punished by United States laws and that the United States pledged to the tribe an "orderly government". Like the *Treaty of Point Elliott* (1859) the *Sioux Treaty* of April 29, 1968, (15 Stat. 635) was devoid of any powers of government to be exercised by the tribe.

In *Ex Parte Crow Dog* the "Catch-22" argument was not successful. The case can hardly be used as a support for the concept of independent tribal sovereignty when the Court determined that the pledge of an "orderly government" inferred that the tribe had no self-government when the treaty was made and the treaty merely provided that subject to an act of Congress they were to receive an "orderly government". The nature of the "orderly government" to be received denying the concept of independent tribal sovereignty was stated by the Court to be:

"***appropriate legislation thereafter to be framed and enacted, necessarily implies, ***that among the arts of civilized life,***which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of *self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by an administration of their own laws and customs*******subject to the laws of the United States***as wards subject to a guardian*** advancing from the condition of a savage tribe to that of a people who***it was hoped might become a self-supporting and self-governed society***" (Excerpts made and Emphasis added).

The hiatus in the law whereby major crimes by one Indian offender against an Indian victim was closed by the Major Crimes Act and the issue of its constitutionality came to the front in the *Kagama* case.[70]

[70] *United States v. Kagama*, 118 U.S. 375 (1886).

Two constitutional issues were formed:

(1) The constitutional origin of power for Congress to enact legislation in a territory of the United States, or on a reservation within a state of the union relating to an offense by one Indian against another in either of those two areas; (2) What constitutional justification was there for the exercise of those powers on a reservation within a state?

In essence the Supreme Court solved the issues by indirectly in effect serving a death warrant on the concept of the existence of independent Indian Tribal Sovereignty. The Court recognized that Congress in 1871 had enacted legislation providing:

> "No Indian nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, with whom the United States may contract by treaty. 25 USC §17.[71]

With reference to that act the Court stated:

> "In the opinions [*Cherokee Nation v. Georgia; Worcester v. State of Georgia*] in these cases they are spoken of as "wards of the nation", "pupils" as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. *But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure – to govern them by acts of Congress. This is seen in the act of March 3, 1871****" (Emphasis added).[72]

The Court could find no help in the doctrine of dependent nation in the *"treaty-making system of government"*, or in the commerce clause to justify constitutionally the authority of Congress to pass the Major Crimes Act. It went on further to exclude any inference to be made that even in relations

[71] Ibid. 382 (Appendix to brief 14a).

[72] Ibid. 382

between Indians, not involving non-Indians, the concept of independent Indian tribal sovereignty *can* exist when the Court stated:

> *"But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these****" (Emphasis added).[73]

The Supreme Court in *Kagama* then used the constitutional thesis of but two sovereignties to establish that Congress within a territory or a reservation had constitutional authority independent of the commerce clause and treaty-making powers to pass such legislation because of the "ownership of the country in which the Territories are****"[74]

Again using the thesis to justify more narrowly the reason that was used by Chief Justice Marshall in *Worcester v. The State of Georgia* to establish the constitutional right of the United States Government to totally exclude and pre-empt the laws of a state in Indian Country within a state (treaty making and self-government of a distinct community of the Cherokee nation), the Court opened the door for states powers on reservations by more narrowly defining the reason for state exclusion by stating:

> "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among who they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States,

[73] Ibid. 379

[74] Ibid. 380

because it has never been denied, and because it alone can enforce its laws on all the tribes." (Emphasis added).[75]

C. Concept Contrary to Judicial Decisions

3. Expansion Era: United States v. States

State powers on a reservation soon intruded. The exclusiveness of United States powers to prevent intrusion because of the concept that a reservation (Indian Country 18 USC 1151) prevents extra-territorial jurisdiction of a state (as was the backbone of the decision in *Worcester v. State of Georgia*)[76] ended with the application of state law and the jurisdiction of state courts in a crime of murder occurring on the Crow Indian Reservation in Montana where the offender and the victim were both non-Indians–*Draper v. United States*, (1896).[77]

There a *non-Indian* defendant had been tried, convicted and sentenced to death *in federal court for murder of a non-Indian* presumably as a violation of the general laws of the United States under the Trade and Intercourse Act (18 USC 1152), and the Assimilative Crimes Act (18 USC §13), on the basis that an Indian reservation as such excludes the powers of the state over the same act. The Court examined the *Crow Indian Treaty* of 1868, 15 Stat. 649, and could find no exclusion in treaty language in creating the Crow Reservation in its treaty with the United States restricting the reservation as not being within the Territory of Montana when it was created. May 26, 1864, C. 95, (13 Stat. 85)

[75] Ibid. 384, 385.

[76] See footnote 53 hereof.

[77] *Draper v. United States*, 164 U.S. 241 (1896)

The Court then formulated the issue and asked:

> "****Has the State of Montana jurisdiction over offenses committed within its geographical boundaries by persons not Indians or against Indians, or did the enabling act deprive the courts of the State of such jurisdiction of all offenses committed on the Crow Indian Reservation, thereby divesting the State pro tanto of equal authority and jurisdiction over its citizens, usually enjoyed by the other States of the Union?" (It is significant to note that the Court did not limit its question to jurisdiction of the state to crimes by non-Indians against Indians).[78]

The Constitution of the State of Montana through the enabling act of Congress (February 22, 1889, 25 Stat. 675, c. 180) contained the same restrictive language of powers of that state that are set forth in the Constitution of the State of Washington in Article XXVI, to wit:

> "Second. That the people inhabiting the said proposed State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States****"[79]

The Court decided that the above words in the Constitution of Montana providing: "And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States", did not mean "exclusive jurisdiction", by showing that through acts of Congress subsequent to agreements with the Crow Indians, sale of tribal

[78] Ibid. 242

[79] Art. XXVI, Constitution of Washington, (Appendix to brief 3a-4a).

lands took place and allotments to Indians took place in severalty which became the pattern in subsequent legislation by Congress under the General Allotment Act. Upon completion of the severalty allotments to Indians and the issuing of patents, the General Allotment Act provided that the members of the tribes would then be subject to both the civil and criminal laws of the State or Territory where the allotment and patenting took place. April 11, 1882, c. 74, 22 Stat. 42; General Allotment Act: February 8, 1887, c. 119, 24 Stat. 388.

The Court then determined that the reservation of jurisdiction of the United States contained in the Constitution of Montana: "all lands lying within said limits owned or held by any Indian or Indian tribes, and until title thereto shall have been extinguished by the United States****" was relevant to preventing jurisdiction being taken by the State of Montana when title of the United States had become extinguished by allotment in severalty and *but* for such reservation of jurisdiction Indians would have become under the jurisdiction of the state.

In *Draper v. United States* (1896) the Court concluded:

> "****It *follows* that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted into the Union adequately explains the use of the words relied upon and demonstrates that in reserving to the United States jurisdiction and control over Indian lands *it was not intended to deprive that State of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians,* and that a consideration of the whole subject fully answers the argument that the language used in the enabling act becomes meaningless *unless it be construed as depriving the State of authority to it belonging in virtue of its existence as an equal member of the Union*****" (Emphasis added).[80]

[80] Ibid. 247

With such conclusion the concept of independent tribal sovereignty of the Suquamish Indian Tribe is meaningless in its claim of having powers of government over non-Indians and their lands and things within the Port Madison Indian Reservation in the event that the United States no longer has jurisdiction. The same reasoning in *Draper v. United States* is applicable as to the powers of the State of Washington on the Port Madison Indian Reservation. The jurisdiction of the United States has ended on the Port Madison Indian Reservation as to crimes between non-Indians on the reservation, and the general powers of the state of Washington over its own citizens, which are not subject to the limited enumerated constitutional powers of the United States Government, have come to be exercised.[81]

C. Concept Contrary to Judicial Decisions

4. Modern Era: United States v. Tribes

In 1934 the period of assimilation of Indian lands, Indian people and Indian government on Indian reservations abruptly ended with the passage by Congress of the Indian Reorganization Act of 1934.[82] In 1953 assimilation continued again, only more forcefully, by passage by Congress of Public Law 280 providing for full criminal and civil jurisdiction of

[81] See Brief of Kitsap County, *amicus*, as to the jurisdictional history of the area in question.

[82] *Indian Reorganization Act* (1934) 48 Stat. 984 (Appendix to Brief 16a: 25 USC §476; 16a-17a: 25 USC §477).

state laws within Indian reservations.[83] In 1968 there was again a partial reversal of the 1953 legislation by passage of the Indian Civil Rights Act. In this modern era there is a new challenge being asserted by Indian Tribes with new resources asserting the authority of the tribe in the context of original sovereignty not dependent upon treaties or acts of Congress to have territorial jurisdiction of their governments over all persons, lands, and things within a reservation although the status of those persons, lands and things were and had become non-Indian subject to the laws of the state where the reservation was located during the previous period of assimilation.[84]

Now that tribes with "self-determination" are supplied with new funds and resources from the federal government through contracts with the United States in an *amount dependent upon a head count of persons and things under their jurisdiction,* it becomes more important in order to avoid conflicts of law and jurisdiction between the United States and tribes, States and tribes, and States and the United States;

[83]67 Stat. 588 (1953), Public Law 83-280; H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1958): "It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and perogatives pertaining to American citizenship; *** "

[84]Martone, 51 Notre Dame Lawyer 600 (1976). "The United States is in the midst of a new civil war. *** Though the war began when the first white men settled on the North American continent, and has continued unabated to the present, the struggle has reached a new state in which the Indian tribe rather than the settler is on the offensive *** " Resources and funds of the United States are supplied tribes via: Indian Self-Determination Act, Pub. L. 93-638, §2, Jan. 4, 1975, 88 Stat. 2203, 25 USCA §450, et seq.

duplication in services, and waste of manpower and resources, to decide the issue of the source of powers of government of a tribe when not set forth in a treaty: original sovereignty or that dependent upon the constitutional powers of the United States Government through acts of Congress.[85]

The decisions of *Cherokee Nation v. The State of Georgia* (1831), *Talton v. Mayes* (1896), *Oliphant v. Schlie* (1976), and *United States v. Wheeler* (1976), are in conflict on that issue.[86] *Cherokee Nation v. The State of Georgia* and *Talton v. Mayes* may be excluded insofar as the language of the treaties with the Cherokee nation explicitly recognized the Cherokee nation at the time of those judicial decisions as having powers of self-government, but included insofar as being termed "dependent nation", or "dependent communities".

The decision of *United States v. Wheeler* (1976), supra, is in irreconcilable conflict with the decisions of *Talton v. Mayes* (1896), supra and the decision in the *Oliphant* case. There a Navajo Indian had been charged, prosecuted and convicted on a plea of guilty of the crime of contributing to the delinquency of a minor by the Navajo Tribal Court, presumably for an offense of its law occurring on the Navajo Reservation. The victim was a female Indian minor. Later, the federal government as one of the offenses of the Major Crimes Act, (18 USC sections 1153, 2032, (1970)) charged the same defendant for the same actions against the victim that constituted the Indian crime of contributing to the delinquency of a minor, carnal knowledge of a minor, in federal court, as a crime of the United States. The Indian

[85]Ibid: 25 USC Sec. 450 f. et seq, Also: A.9,13,91; Oliphant R.65, Exhibit 1.

[86]*Cherokee v. The State of Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Talton v. Mayes*, 163 U.S. 376, (1896); *Oliphant v. Schlie*, 544 F.2d 1007 (1976) A-___; *United States v. Wheeler*, 545 F.2d 1255 (1976).

defendant claimed the defense of double jeopardy under the 5th amendment of the United States Constitution, arguing that the violation of the law of the Indian tribe and the violation of the law of the United States arising out of the same action was a crime against one sovereign.

While the case might not be relevant to this case so far as the Petitioners herein are non-Indians, it is relevant that the court in *United States v. Wheeler* denied the concept of separate sovereignty of the Navajo tribe from that of the United States–even as to crimes by Indians against Indians in Indian Country. In effect, the result of the decision is that an Indian Tribal Court limited to punishment of a $500.00 fine and/or six months in jail upon the trial and punishment of criminal defendants for major crimes committed against the laws of the United States. By this analysis, an Indian could murder a non-Indian, or a non-Indian murder an Indian on the Port Madison Indian Reservation in the State of Washington and be tried for assault in Tribal Court, fined $500.00 and sentenced to six months in jail and escape a much harsher punishment by the Federal Court of the United States for violation of a major crime of the United States.

In comparing the conclusions made in the majority opinion of Chief Justice Marshall in *Cherokee Nation v. The State of Georgia*, it was stated:

> "Is the Cherokee nation a foreign state in the sense in which that term is used in the Constitution?*****So much of the argument as was intended to prove the character of the Cherokee nation as a state*, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, *has, in the opinion of the majority of the Judges, been completely successful*****" (Emphasis added).[87]

Whereas the majority opinion in *United States v. Wheeler* (1976) writes:

[87] *Cherokee v. The State of Georgia*, 30 U.S. 16 (1831)

> "In the instant case, we are faced by a dual trial situation that does not fit neatly into either the "single sovereign" or "dual sovereign" categories. Indian tribal courts are not merely a political unit of the Federal Government, such as federal district courts, military tribunals, etc. Indian tribes do maintain a "semi-independent position" within the borders of the United States**** *But, at the same time, they clearly do not have the sovereign status of a state******The federal government has complete, plenary control over the criminal jurisdiction of tribal courts******It possesses no such control with respect to the states*". (Emphasis added).[88]

United States v. Wheeler (1976) is inconsistent with *Talton v. Mayes* (1896) in that in each a criminal Indian defendant argued the 5th amendment: Mayes upon a conviction of murder under Indian law by an Indian court, and Wheeler under an indictment for violation of a major crime of federal law by a federal court. Mayes was punished; Wheeler was released. Mayes argues that the 5th amendment was applicable to tribal court proceedings, but the Court held that the Cherokee nation's right to self-government arose prior to the Constitution and therefore the 5th amendment was not applicable. The Court further held it was not a case of local powers delegated to the tribe of the powers of the federal government to which the 5th amendment would apply.[89]

The *Oliphant* majority decision of the 9th Circuit is consistent with the *Mayes* case in theory of original sovereignty, and yet inconsistent in that the Cherokee Treaty provided for jurisdiction over Mayes as an Indian, and the Point Elliott Treaty (1859) is silent as to tribal powers over Indians or non-Indians. The Petitioner's argument is consistent with the decision in the *Wheeler* case, but the decisions in the two cases are inconsistent–*Oliphant* is concerned with original

[88] *United States v. Wheeler*, 545 F.2d, 1255, 1257

[89] *Talton v. Mayes*, 163 U.S. 376 (1896), 384, 385

sovereignty; *Wheeler*, relates to local government of United States Government or the one sovereignty concept. Thus it can be said a non-Indian before a tribal court exercising powers of local government arising from powers of the United States (*Wheeler*), is denied the protection of the United States Constitution. In effect there is constitutional protection from actions of the principal (United States) but not against actions of the agent (tribes) in carrying out the actions of the principal–perhaps on the theory that the agent is not an agent, he is an independent contractor.

C. Concept Contrary to Judicial Decisions

4. Modern Era: United States v. States

In *Williams v. Lee* (1958),[90] a non-Indian, licensed by federal statute to operate a general store on the Navajo Indian Reservation endeavored to collect a debt incurred in the store on the reservation from a member of the tribe. Williams had attacked the jurisdiction of state court over his person, his sheep and his debt all located on the reservation. The Arizona Supreme Court had upheld state court jurisdiction in an opinion that ignored the existence and possible jurisdictional claim of the tribal court. The Supreme Court in overruling the state supreme court's decision in the opinion of Justice Black stated:

> "****The broad principles of that decision [*Worcester v. Georgia*, 6 Pet. 515] came to be accepted as law. Over the years *this Court has modified these principles in cases where essential tribal relations were not involved*****" (Emphasis added).[91]

* * * * *

[90] *Williams v. Lee*, 358 U.S. 217 (1958)

[91] Ibid. 219

> "*Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians* to make their own laws and be ruled by them." (Emphasis added).[92]

After reviewing acts of Congress the Court concluded:

> "No Federal Act has given state courts jurisdiction over such controversies."
>
> "****There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence *would infringe on the right of the Indians to govern themselves.*" (Emphasis added).[93]

In *Kake v. Egan*, (1962)[94] the Court affirmed the denial of injunctive relief by two communities, Kake and Angoon from preventing the State of Alaska from enforcing its conservation laws where Indian traps were seized and the Indian President of the Indian Council and crews of the village were arrested by state authorities. The operation of the traps by the communities was authorized by federal laws and regulations. The opinion written by Justice Frankfurter made the following conclusions:

> "The general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia* (US) 6 Pet 515, 561, 8 L ed 483, 501; Kansas Indians (*Blue Jacket v. Johnson County*) (US) 5 Wall 737, 755-757, 18 L ed 667, 672, 673; and New York Indians (*Fellows v. Denniston*) (US) 5 Wall 761, 18 L ed 708, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when con-

[92] Ibid. 220

[93] Ibid. 223

[94] *Kake v. Egan*, 369 U.S. 60 (1962)

fronted, in the course of subsequent developments, with diverse concrete situations."[95]

* * * * *

"Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall."[96]

* * * * *

"In the absence of a limiting treaty obligation of Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. *New York ex rel. Ray v. Martin,* 326 U.S. 496, 499****."[97]

In *Warren Trading Post Co. v. Arizona Tax Commission* (1965)[98] another case involving a licensed trader on the Navajo Indian Reservation the Court determined that the Arizona law applying a tax on the gross income was invalid. Justice Black wrote the opinion. First was rejected consideration of the issue as to the state law being inoperative because of the commerce clause, and the Court wrote the following:

"Since we hold that this state tax cannot be imposed consistently with federal statutes applicable to the Indians on the Navajo Reservation, we find it unnecessary to consider whether the tax is also barred to that part of the Commerce Clause giving Congress power to regulate commerce with Indian tribes."

The opinion then went on to review statutes of the United States regulating trade and intercourse with Indian tribes in 1790, 1802, 1834 and 1901 and Commissioner of Indian Affairs regulations, under whose authority the non-Indian

[95]Ibid. 72

[96]Ibid. 74

[97]Ibid. 75

[98]*Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965)

business was regulated on the Navajo Reservation and with reference stated:

"These apparent all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that *Congress has taken the business of Indian trading on reservations so fully in hand* that no room remains for state laws imposing additional burdens upon traders." (Emphasis added).

With particular reference to the Navajo Reservation the Court stated:

"Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control****"

* * * * *

"This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition those Congress or the tribes have prescribed ****And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax."

In *Kennerly v. District Court of Montana,* (1971)[99] the Blackfoot Indian Tribe, organized under the Indian Reorganization Act of June 18, 1834, 48 Stat. 984, 25 U.S.C. 461 et seq. had consent to the State of Montana by ordinance to share concurrent and not exclusive jurisdiction of all suits wherein the *defendant* is a member of the tribe which is brought before the Courts. It would seen reasonable to imply that if the concept of independent sovereignty of a tribe existed concurrently with powers of the United States that the tribe could have shared its powers with that of the State of Montana, unless the treaty or acts of Congress expressly denied those tribal powers.

[99]*Kennerly v. District Court of Montana*, 400 U.S. 423 (1971)

Further to deny that it had such powers could not logically be made on the infringement test in the opinion of Justice Black in the *Williams* case. The fact pattern at issue was similar to that in the *Williams* case: collection by a non-Indian to collect a debt in state court against an Indian defendant for a debt incurred on the reservation.

The applicable statute involved was Public Law 280, Act of August 15, 1953, 67 Stat. 590 where Congress provided that:

> "****any other State not having jurisdiction with respect to criminal offenses or civil causes of action, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action obligate and bind the State to assumption thereof."

Montana had not taken such action; *the statute did not provide that tribes could not take such action* – yet the Supreme Court denied state court jurisdiction. The Court qualified the *Williams* test by the qualification contained in the test that rights of tribal government are subject to a "governing act of Congress". The act of 1953 was determined to be such an act and that the powers of the United States through that act did not intend that the State of Montana was to have jurisdiction over the civil collection of a debt from an Indian defendant in state court. It is noted that the consent of the tribe was made in 1967 after the act of Congress leaving the implication that *any independent powers of the tribe are subject to the will of Congress expressed on substantive matters before the powers of the tribes are exercised.*

The 1953 act was repealed by the Civil Rights Act of 1968 (25 U.S.C. 1321 - 1326 (1964) ed. Supp-V). In Section 406 of the Act, 25 U.S.C. 1326 (1964) ed. Supp-V, consent of the United States was given for a state to have civil jurisdiction in Indian Country provided a majority of Indian members in the affected area vote for such consent. The 1967 action of the

tribe was by its governing council and not by a majority vote of the enrolled members of the tribe. In determining that since the council's ordinance was not effective to grant jurisdiction under the 1968 legislation the Court restricted its holding to the procedures required by the act such as a majority vote of the enrolled Indian members of the tribe. *Again it can be implied that not only can the substantive powers of a tribe be limited by acts of Congress not containing an express restriction on those uses of powers before the action of the tribe in exercise of those powers, but also the procedure and method can be limited by an act of Congress.*

It is impossible to reconcile the concept of Indian independent sovereignty as applied in the *Oliphant* and *Belgarde* cases with the decision in the *Kennerly* case. It also may be concluded that the relation in the traditional struggle of the jurisdiction of the United States to that of the States in relation to Indian affairs has taken on a greater importance in light of the 1953 and 1968 legislation than the protection of self-government of Indian tribes especially where a non-Indian is involved.

Commentary on the *Williams-Kake-Warren* triology has led to the following conclusions relevant to the Supreme Court's opinions. The new "*infringement test*" of the *Williams* case, state powers being excluded because of interference with tribes right to govern themselves "absent governing acts of Congress", acknowledged that complete federal preemption (*Worcester v. Georgia*) was limited to the new test announced in the rule. The *Kake* opinion conceded the test as applicable and then in determining that the Alaska Statehood Act was not one of "governing acts of Congress" that under *Williams* would bar state action concluded with the presumption that the state had such powers. Thus the weight of the decisions were dependent upon where the presumption of power lay: must proof first be that the state is included unless expressly

limited by congressional actions? *Warren* restored in part the preemption doctrine and established boundaries to the scope of federal preemption in Indian litigation – "the areas covered by acts of Congress and by federal policies concerning reservations."

As to Indian sovereignty, *Williams* for the first time recognized an independent Indian interest in self-government which stood as a barrier to state powers. *Kake* ignored the idea. In *Warren*, the court had the opportunity, but it side stepped the principal by resorting to preemption principles.

The companion case to *Kennerly v. District Court of Montana* is *McClanahan v. Arizona State Tax Commission* involving state income tax of Arizona taxing the income of a Navajo Indian derived from earnings on the Navajo Reservation.[100] The Indian taxpayer brought a claim for refund in the Arizona court, the court dismissed her claims on the basis of the *Williams* case that it was not an infringement of the tribe's right to govern, but only a burden on her. Further the Arizona court determined under the organized village of *Kake v. Egan* (1962) that the Arizona enabling act was not a "governing act of Congress" to prevent jurisdiction of the state and therefore the state had jurisdiction.

The Supreme Court, recognizing the complexity of the case, reviewed previous decisions where normally tax exemption of Indian property on a reservation rested on the doctrine of federal instrumentality and did not turn on the Indian sovereignty doctrine.[101] It then stated the following, regarded as pertinent to the doctrine of sovereignty:

> *"Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward federal preemption."*

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[100]*McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1972)

[101]Ibid. 164

> "The source of federal authority over Indian matters has been the subject of some confusion, but it is not generally recognized that the power derives from federal responsibility with Indian tribes and for treaty making. (Citation omitted). *The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.*" Compare, e.g. *United States v. Kagama*, 118 U.S. 375 (1886), with *Kennerly v. District Court*, 400 U.S. 423 (1971) (Emphasis added).
>
> "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes *were once independent and sovereign nations*, and that their claim to sovereignty long predates that of our government."[102] (Emphasis added).

The Court then noted:

> "The problem posed by this case is completely different. [*Williams* and *Kake v. Egan* cases]. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty statutes leave for the Federal Government and for Indians themselves.

The Court then distinguished the *Kennerly v. District Court*, 400 U.S. 423 (1971) by stating that if Montana courts in that state could not have jurisdiction even when the tribe consented how could a state that does not have such consent as in this case have jurisdiction.

In excluding the power of a state government to tax the income of an Indian earned on the reservation the Supreme Court's opinion in *McClanahan v. Arizona State Tax Commission* rests *not* upon the powers of Indian government, but upon the absence of powers of the state in a purely

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[102]Ibid. 172

Indian matter within the exclusive sphere of the powers of the United States Government not involving non-Indians.

D. Concept Contrary to United States Constitution

The Suquamish Indian Tribe is an organization of Indian members, chartered by the United States pursuant to an act of Congress with a Constitution approved by the Secretary.[103] It is a tribe with an Indian government of a few people, by a few people, and for a few Indian people, exercising jurisdiction as an "original" sovereign state, civilly and criminally, over all the people, lands and things on the Port Madison Indian Reservation within the jurisdiction of the United States and the State of Washington.[104]

The concept that an Indian tribe was before and after the adoption of the United States an original, independent sovereign entity with inherent internal powers of government over all people, lands and things on a reservation, located within the boundaries of the United States and a State of the Union, is repugnant to and in conflict with the very framework and basis for which the Declaration of Independence was made, the revolutionary war was fought, and the United States Constitution created: to protect the people

[103]48 Stat. 984 (1934) Indian Reorganization Act. (See Appendix to brief: 25 USC §476, Organization of Indian Tribes, 16a and 25 USC §477 Incorporation of Indian Tribes, 16a-17a.) (See Appendix to brief: Constitution and By-Laws of the Suquamish Indian Tribe: 1916 and 1965 Constitutions, 4a-5a.)

[104](Appendix to brief: Suquamish Tribal Law and Order Code, 21a; Tribal Resolution No. 77-065 Excluding non-Indians From Tribal Juries, 65a; Tribal Zoning Law, declaring building moratorium on all lands on the reservation, 47a)

within the United States from the exercise of powers of governments over them without their consent.[105]

In the United States Constitution the people for their protection consented to the formation of the Union pursuant to the Preamble: "****To secure the blessings of liberty to ourselves and our posterity****", and did consent but to two powers over them within the United States: the Federal Government with enumerated powers set forth in establishing the legislature, executive and judicial branches of the Federal Government, and the States of the Union. To further protect themselves from powers of government they consented in the constitution to laws being passed exercising federal jurisdiction over them only pursuant to those laws promulgated by their elected representatives in exercise of limitedly expressed powers of Congress, Article I, Section 8, and did establish that the United States shall guarantee to every State in the Union a republican form of government: Article IV, Section 4. In Article IV, Section 3 they insured themselves that no other States would be added to the Union with powers of government over them by prohibiting the addition of new States made within the jurisdiction of a State, or by joining of several States made within the jurisdiction of a State, or by joining of several States together, without the consent of the Legislatures of the States concerned as well as of Congress.

For individual protection in the exercise of judicial authority over them the Constitution provided in Article III, Section 2, Clause 3:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be

[105]Supra. Footnote 115 hereof: Justice Baldwin; *Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet. 17 and 18) 515 (1831)

at such place or places as the Congress may by law have directed."

In Article IV, Section 2, Clause 1, further protection was made to persons citizens of the State by declaring:

"The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Finally in order that the framework of representative government by the United States and States of the Union and the individual protections of the people would not change the Constitution of the United States was made the supreme law of the land: supreme as to laws of the United States, treaties already made or to be made, Constitutions of the State or laws of the State. Article VI, Clause 2.

A great Civil War took place between the Union of the States and a confederation of states endeavoring to separate from the Union. After many bloody battles, that attempt failed to withdraw States of the Union from the United States with governments not subject to the United States Constitution. The attempt through judicial decisions that recognize separate independent governments of Indian tribes with inherent powers of government over peoples, lands, and things within the United States and not under the United States Constitution should likewise fail.

Following the Civil War in July 28, 1868 to insure the protection of the United States Constitution from congressional or state action to persons born or naturalized in the United States, not owing allegiance to alien power (such as Indians owing allegiance to their tribe), such persons regardless of race, creed or color, born or naturalized in the United States and subject to its jurisdiction were declared citizens of the United States and citizens of the State of the Union in which they reside. By the declaration in that amendment of dual citizenship, there was extended further

protection of fundamental rights of state citizens from state action:[106]

(1) "****No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"

(2) "****nor shall any State deprive any person of life, liberty, or property, without due process of law;***"

(3) "****nor deny to any person within its jurisdiction the equal protection of the laws."

The Suquamish Indian Tribe does not have the sovereign status of a "foreign state",[107] a state not of the Union,[108] or a state of the Union. There was no delegation of authority of powers of government of the United States government to the Suquamish Indian Tribe either over Indians or non-Indians and there was no acknowledgment of sovereignty of powers of government of the Suquamish Indian Tribe in the Treaty of Point Elliott of 1855.[109] The Port Madison Indian Reservation is within the jurisdictional territory of the United States and of the State of Washington.[110]

Those persons owing allegiance to the Suquamish Indian Tribe and to whom the President of the United States issued

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[106]Amendment XIV, United States Constitution, USCA, Constitution; *Elk v. Wilkins*, Neb. 1884, 112 U.S. 94,101; *McKay v. Campbell*, D.C. Or. 1871, 2 Sawy., U.S., 118, 16 Fed Cas. No. 8,840; *Relation of Indians to Citizenship*, 1856, 7 Op. Atty. Gen. 746.

[107]*Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1 (1831)

[108]*United States v. Wheeler*, 547 F.2d. 1255,1257 Supra; Footnote ____; *United States v. Kagama*, 118 U.S. 375 (1886); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164,172-173.

[109]*Point Elliott Treaty*, (Appendix to brief 6a,) 12 Stat. 927

[110]*Draper v. United States*, 164 U.S. 241 (1896)

allotments were not made citizens of the United States under the 14th Amendment because the jurisdiction of the United States was not then over them personally but over their tribe within the meaning of the 14th Amendment. After patent was issued to those Indians by the President of the United States and the General Allotment Act Feb. 8, 1887, (c. 119, 24 Stat. 390, Sec. 6; 25 USC 348, 349) such Indians became citizens of the United States and of the State of Washington. *United States v. Celestine,* (1909).[111] While the effect of such allotment, patenting and citizenship of Indians may have not terminated the powers of the United States Government in relationship of guardianship to them, a new relationship was established because of citizenship of such Indian tribal members in relationship to that of the State.[112]

All citizens of the United States now residing on the Port Madison Indian Reservation are citizens of the State of Washington.[113] The Port Madison Indian Reservation is within the territorial jurisdiction of the State of Washington.[114]

A non-Indian while being protected under the United States Constitution from federal and state governmental action, under the concept of Indian independent tribal sovereignty does not enjoy the right to be governed by a government in which he is entitled to be represented. In addition, such individual is subject to actions by a racial government even

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[111]*United States v. Celestine*, 215 U.S. 278, 289 (1909)

[112]*State v. Big Sheep*, 243 P. 1067, 75 Mont. 219 (1926); *Dillon v. Antler Land Co. of Wyola*, C. A. Mont. 1974, 507 F.2d 940, certiorari denied 96 S. Ct. 1998, 521 U.S. 992, 44 L. Ed. 2d 482. All Indians born in the United States are now considered nationals and citizens of the United States: Citizenship Act of 1924, 8 U.S.C.A. citizens of the United States: Citizenship Act of 1924, 8 U.S.C.A. Sec. 3, and the later Nationality Act of 1940, 8 U.S.C.A. Sec. 601.

[113]*United States Constitution*, Amendment XIV.

[114]*Draper v. United States*, 164 U.S. 241 (1896)

though they were the actions of the federal or a state government he would be protected against under his individual rights as a citizen of the United States and the State of Washington.

There then exists on the Port Madison Indian Reservation a special classification of rights, privileges and immunities that a member of the tribe as a citizen of the United States and State of Washington has that a non-Indian does not have that deny to the non-Indian citizen of the United States and State of Washington residing on the Port Madison Indian Reservation his liberty and use of his property without due process or equal protection.

A comparison of the unequal rights, privileges and immunities between non-Indians and Indians, both citizens of the United States and of the State of Washington follows:

GOVERNMENTAL ACTION	NON-INDIAN	INDIAN
1. *Federal Government:* U.S. Citizenship, voting rights, law by representation	Yes	Yes
2. *State Government:* State Citizenship, voting rights, laws by representation	Yes	Yes
3. *Indian Government:* Membership, voting rights, laws by representation	No	Yes
4. *Subject to both State Laws and Independent Tribal Law on Reservation, re:*		
(a) Income tax	Yes	No
(b) Zoning of lands occupied	Yes	No
(c) Real estate taxes	Yes	No
(d) Regulation of business activity	Yes	No

(e)	Laws and Prosecution for victimless crimes by a Non-Indian	Yes	----
(f)	Laws and Prosecution for victimless crimes by an Indian	----	No
5.	*Collection of debt* in state court by non-Indian v. Indian for transaction on reservation	No	----
6.	*Collection of debt* in state court by Indian v. non-Indian for transaction on reservation	----	Yes
7.	Subject to both Federal Laws and Independent Tribal Laws on Reservation, re:		
(a)	Minor crimes by Indian v. non-Indian victim	----	No 18 USC §1152 *United States v. Wheeler*, 545 F.2d 1255 (9th Cir., 1976); On Petition for a Writ of Certiorari Supreme Court of the United States
(b)	Major crimes by Indian v. non-Indian victim	----	No 18 USC §1153 *United States v. Wheeler*, supra
(c)	Minor crimes by non-Indians v. Indian	Yes (*Oliphant* and *Belgarde* Case) 18 USC §1152; 18 USC §13	----
(d)	Major crimes by non-Indians v. Indian	Yes (*Oliphant* and *Belgarde* Case) 18 USC §1152; 18 USC §13	----

If a State of the Union were to deny voting privileges to a resident of the state based solely upon racial classification, such state action would be unconstitutional in violation of the privilege and immunities clause in accordance with Section 1 of the 14th Amendment.[115]

If action of a State becomes formerly entwined with that of a private organization causing racial discrimination in the advancement of state governmental policy whereby that organization becomes an agency or instrument of the state with governmental powers, the actions of the state as well as the private organization are in violation of the privileges and immunities clause of the 14th Amendment.[116]

What is the difference between the *Suquamish Indian Tribe* as a quasi-governmental organization based upon racial ancestry of their members exercising for the benefit and protection of their members only powers of government over non-members and their property when chartered by the United States, receiving funds from the United States Government for Law and Order, being dependent upon and subject to the laws of Congress of the United States in its relationship with the United States; and that of a *State* of the Union, using its powers of government to support a racial organization to which other citizens of the state and the United States cannot belong because of their race that exercises general powers of government over them in violation of the privileges and immunities clause of the United States Constitution?

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[115]*Rice v. Elmore*, C.C.A.S.C. 1947, 165 F.2d 387, certiorari denied 68 S.Ct. 905, 333 U.S. 875, 92 L. Ed. 1151.

[116]*Mash v. Alabama*, 326 U.S. 501 (1946); *Evans v. Newton*, Ga. 1966, 86 S. Ct. 486, 382 U.S. 296, 15 L. Ed. 2d 373 (1965). On remand 148 S.E. 2d 329, 221 Ga. 870; *Ethridge v. Rhodes*, D.C. Ohio (1967), 268 F. Supp. 83; *Bowman v. Birmingham Transit Co.*, C.A. Ala. (1960) 280 F.2d 531.

Is not the connection between the United States Government, although there was no delegation of its legislative, executive and judicial powers to the Suquamish Indian Tribe, sufficiently entwined with that of tribes to be an action of the United States Government when such action against a non-Indian would otherwise be prohibited by the United States Constitution 5th Amendment.[117]

[117] *Reid, Superintendent, District of Columbia Jail v. Covert*, 354 U.S. 1, 5, 6, 7. Should no less the rights of a citizen on a reservation be protected from an organization under the protection of the United States? In other words if the United States or its instrumentalities were to delegate its powers to a racial organization to have powers of government over persons on a reservation and deny those persons a participation in that local government and subject them to trial by jury without their peers (See Appendix to brief 65a and other matters set forth in the Statement Of The Case), why should any branch of the federal government support indirectly which they could not constitutionally do directly?

The connection has been established: *United States v. Kagama*, 118 U.S. 375, 381-382, (1886); *United States v. Wheeler*, 545 F.2d 1255 (1976)

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II.

WHETHER THE UNITED STATES, HAVING PLENARY POWER AND POWER BY LAW OVER CRIMES ON AN INDIAN RESERVATION FOR OFFENSES OCCURRING BETWEEN NON-INDIANS AND INDIANS, EXCLUDING THE JURISDICTION OF THE STATE WHEREIN THE RESERVATION IS LOCATED, HAS PROHIBITED THE TRIBE BY EXPRESSION OR IMPLICATION FROM EXERCISING SUCH JURISDICTION CONCURRENTLY WITH THE UNITED STATES OVER THOSE OFFENSES OCCURRING WITHIN THE RESERVATION UNDER LAWS OF THE UNITED STATES AND THE UNITED STATES CONSTITUTION.

If the Court determines that the Suquamish are sovereign and have the inherent power to try non-Indians for offenses against tribal law, then the question is whether Congress has ever affirmatively asserted its plenary power over Indian governments to deprive them of this jurisdiction. If the Court decides, however, that the Suquamish are not sovereign, then the question is whether Congress has ever licensed them with jurisdiction over non-Indians.

Both of these questions will be dealt with in this portion of Petitioners' brief, but in order to dispose of them, five separate sub-issues must be resolved. First, does existing federal statutory law permit the Suquamish, or any Indian government, to exercise criminal jurisdiction over non-Indians? Second, do the Suquamish have criminal jurisdiction over non-Indians pursuant to treaty? Third, has the Suquamish Law and Order Code been enacted in accordance with the regulations promulgated by the Secretary? Fourth, is the Suquamish Law and Order Code contrary to the Congressional policy inherent in sections 13 and 1152 of Title 18, United States Code? Finally, would assertion of jurisdiction in this case constitute a denial of due process?

A. Existing Federal Statutory Law Does Not Permit The Suquamish, Or Any Indian Government, To Exercise Criminal Jurisdiction Over Non-Indians.

Section 1152 of Title 18, United States Code, is the framework around which federal criminal jurisdiction within Indian country is built. The jurisdictional scheme set forth in this statute can be traced to the early days of the Republic and it has remained consistent, tribal governments are to have no jurisdiction over non-Indians for criminal acts within Indian country.

> Sec. 1152 Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place *within the sole and exclusive jurisdiction of the United States,* except the District of Columbia, shall extend to Indian country.
>
> This section shall not extend to *offenses committed by one Indian against the person or property of another Indian,* nor to *any Indian committing any offense in the Indian country who has been punished by the local laws of the tribe,* or to any case where, *by treaty stipulations, the exclusive jurisdiction* over such offenses is or may be secured to the Indian tribes respectively. (Emphasis added)

"Within the sole and exclusive jurisdiction of the United States" is the definitive phrase in section 1152. It defines what acts are criminal, what the punishment will be, and where the jurisdiction will lie, i.e. *exclusively within the United States.* In other words, within Indian country conduct is viewed as though it occurred at some place under the sole and exclusive jurisdiction of the United States. Thus only if the act is illegal under the laws of the United States can the offender be tried and punished, if convicted.

The second paragraph excepts from the operation of section 1152 the following categories of offenses: (1) where

both the perpetrator and victim are Indians; (2) where the Indian offender has already been punished by tribal law; and (3) where a treaty stipulation licenses the tribal government exclusive jurisdiction over the offense.[118]

The first two exceptions in the second paragraph of section 1152 are jurisdictional licenses.[119] When read together these exceptions license tribal governments with jurisdiction *over offenses of or among* tribal members. Because Congress has defined tribal jurisdiction within parameters of Indian offenders, tribal courts were obviously not intended to exercise criminal jurisdiction over non-Indians, and courts have so held.

In *Ex parte Kenyon,* 14 F.Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720), the issue was tribal jurisdiction over a non-Indian charged with having committed an offense within Indian country. Judge Parker gave the opinion of the Court in which he stated:

> No one is more gratified than myself to see criminals punished for their crimes by the courts of that country. But when the question is presented whether one of these [tribal] courts had jurisdiction, it is my duty, under the laws of the United States, to examine into it. *Id.* at 354.
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> * * *
>
> But, again, if there was any crime committed, at any time, it was committed not only beyond the place over which the Indian court had jurisdiction, but, at the time it was committed, by one over whose person such court did not have jurisdiction; because, *to give this [tribal]*

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[118]These exceptions only exempt Indians from federal enclave law, and not from the general laws of the United States. Thus an Indian who violates a general federal law, such as 18 U.S.C. App. §1202(a), is not exempt from federal prosecution. *United States v. Burns*, 529 F.2d 114 (9th Cir. 1976).

[119]The third exception relating to treaty stipulations will be dealt with in detail *infra* at .

court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian.[120] (Emphasis added) *Id.* at 355.

The result in *Kenyon* was based upon construction of sections 2145 and 2146 of the Revised Statutes of 1873, presently incorporated in section 1152.

The same question was again before the court in *Ex parte Morgan,* 20 F. 298 (D.C. Ark. 1883), and that Court held:

> Right to try means jurisdiction over the place where the crime has been committed, and over the person who commits it. Now, ordinarily, properly charging a man with the crime of murder, in a state or territory, would be sufficient to show jurisdiction to try, because the courts of all the states and territories have jurisdiction to try for the crime of murder, if committed within their boundaries, regardless of who commits the crime and against whom it is committed. *But this is not so in the Cherokee Nation. The courts of that nation have jurisdiction, and can only try for the crime of murder when the person murdered is an Indian, and the one charged with the crime is also an Indian.* Rev. Stat. §2146. (Emphasis added) *Id.* at 308.

The United States Supreme Court appears to have indirectly considered this jurisdictional question in the 1891 case of *In re Mayfield,* 141 U.S. 107 (1891), where, after reviewing the state of the law the Court observed:

> The policy of Congress has evidently been to vest in the inhabitants of the Indian Country such power of *self-government* as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as

[120]If the legendary Judge Parker determined there was no jurisdiction over non–Indians by tribal courts, then there is no jurisdiction over non-Indians by tribal courts. *See Law and the American Indian,* Monroe E. Price (1973) pp. 171-172 for discussion of *Kenyon.*

> possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy, and to construe the acts of the legislative authority in consonance therewith. The *general object of these statutes* [sections 2145 and 2146 of the Revised Statutes of 1873] *is to vest in the courts of the nation jurisdiction of all controversies between Indians or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.* (Emphasis added) *Id.* at 115-116.

The third exception is the second paragraph of section 1152 sets out the only other source of tribal jurisdiction under the statute: treaty stipulation. Congress recognized that treaty commitments were binding upon section 1152, but only if they specifically licensed exclusive jurisdiction over the offense. Stated otherwise, the jurisdiction must be expressly set forth in a treaty and it must be exclusive. If this is not done then treaty obligations are subjugated to section 1152. In the instant case neither of the Suquamish agreements specifically license exclusive jurisdiction over non-Indians; discussed in detail *infra* at .

Construing section 1152 to foreclose tribal jurisdiction over non-Indians is consistent with and supported by the Major Crimes Act, 18 U.S.C. §1153. Section 1153 provides in pertinent part:

> *Any Indian* who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, *shall be subject to the same laws and penalties as all other*

persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (Emphasis added).

The jurisdictional language in sections 1152 and 1153 is essentially the same: within the exclusive jurisdiction of the United States. Nevertheless there is a difference: the phrase "shall be subject to the same laws and penalties" is not found in section 1152. The existence of this phrase in section 1153, however, serves to withdraw a portion of the jurisdictional license Indian courts acquired from the first two exceptions in section 1152; i.e., jurisdiction over offenses of or among tribal members. *See generally,* 16 Cong. Rec. 934-35 (1885) (Remarks of Rep. Bud).

Federal courts have exclusive jurisdiction over the crimes enumerated in section 1153. *Sam v. United States,* 385 F.2d 213, 214 (10th Cir. 1967); *see Felicia v. United States,* 495 F.2d 353, 354 (8th Cir. 1974), *cert. denied,* 419 U.S. 849 (1974). Therefore federal courts must also have exclusive jurisdiction over non-Indians under section 1152. Otherwise, the situation would be that section 1153 extinguished the tribal jurisdiction licensed in section 1152 with regard to Indians committing the specified crimes, but since section 1153 is silent as to non-Indians, any jurisdiction over non-Indians licensed by section 1152 would remain with tribal courts. This is an untenable construction: that Congress intended to license tribal jurisdiction over non-Indians committing "major offenses", and at the same time deny tribal courts jurisdiction over Indians committing the same illegal acts.

It is recognized that the alleged crimes at issue here do not fall within the Major Crimes Act. Respondents would presumably concede that tribal courts do not have jurisdiction over non-Indians for the enumerated "major crimes" in section 1153. But the reason that tribal courts do not have jurisdiction over non-Indians for "major crimes" is not the

Major Crimes Act, for as noted above section 1153 is silent as to non-Indians. Tribal courts can not try non-Indians for "major crimes" because section 1152 does not license them with any jurisdiction over non-Indians.

The following is a brief review of the legislative history of section 1152 and related Congressional acts, and it further illustrates the intent of Congress to retain non-Indians within the exclusive jurisdiction of the courts of the United States.

The Continental Congress passed the Northwest Ordinance in 1787, and it was later incorporated into the laws of the United States by Congress. 1 Stat. 50 (1789). Article III of this ordinance provided in part:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; *but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done them, and for preserving peace and friendship with them.* (Emphasis added) *Id.* at 52.

With passage of this provision Congress was stating its responsibility to protect Indian peoples from wrongs being done them by non-Indians. Inherent in such an admission is the inference that tribal authority did not extend to wrongs committed by non-Indians.

During the decade following enactment of the Northwest Ordinance a series of temporary measures were passed to protect Indians. These were the Indian Trade and Intercourse Acts of 1790, 1793, 1796 and 1799. 1 Stat. 137 (1790); 1 Stat. 329 (1793); 1 Stat. 469 (1796); 1 Stat. 743 (1799). These laws attempted to define substantive duties and rights in Indian affairs, and they are the taproot of section 1152.

By 1799 the Trade and Intercourse Act had expanded from seven to twenty-one sections, and most of the expansion was

directed towards non-Indian criminal conduct. Section 4 of the 1799 law was the general criminal provision.[121]

> Sec. 4 And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, *which would be punishable if committed within the United States;* or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, *such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months;* and shall also, when property is taken and destroyed, forfeit and pay to such Indian or Indians, to whom the property taken or destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed. And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence. (Emphasis added) 1 Stat. 743, 745 (1799)

Section 4 defined criminal conduct in terms of state law, but it did not adopt state sanctions. Punishment was specifically provided for: one hundred dollar fine and twelve months imprisonment. This section also provided for restitution to Indians whose property had been taken or destroyed by non-Indians; which suggests that non-Indians were not even subject to the civil jurisdiction of tribal courts.

[121]Murder of an Indian by a non-Indian was proscribed in section 6 and made punishable by death.

Section 14 applied to offenses by Indians and it empowered the President to take such steps as would be necessary to obtain satisfaction for the injury. However section 14 only covered Indian offenses committed against non-Indians beyond the boundaries of Indian territory. A restitution provision was included in section 14 also. *Id.* at 747.

Section 15 concerned jurisdiction and it provided in part:

> That the superior courts in each of the said territorial districts, and the circuit courts, *and other courts of the United States* of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be brought for trial, *shall have and are hereby invested with* full power and authority to hear and determine all crimes, offenses and misdemeanors, against this act: *such courts proceeding therein, in the same manner, as if such crimes, offenses and misdemeanors had been committed within the bounds of their respective districts.* (Emphasis added). *Id.* at 747.

Similar jurisdictional language is found in the earlier Intercourse Acts, and it must be read as vesting jurisdiction over non-Indians exclusively within the courts of the United States. *See, e.g.,* §6, 1 Stat. 137, 138 (1790); §10, 1 Stat. 329, 331 (1793); §15, 1 Stat. 469, 473 (1796).

An analysis of the aforementioned sections of the 1799 Trade and Intercourse Act reveals that Congress was expanding its protection of Indians. At the same time, however, Congress was reluctant to grant the same protection to non-Indians. Non-Indians committing criminal acts against Indians within Indian territory were prosecuted in federal court, and punished if convicted. Non-Indians also had to make restitution for any Indian property taken or destroyed. Indian offenders on the other hand, were only criminally or civilly liable for their offenses against non-Indians if they occurred beyond the boundary of Indian territory. Moreover,

there were no sanctions for offenses among Indians, these were left to be dealt with by the respective tribes.

March 30, 1802, a new Indian Trade and Intercourse Act was passed. This was merely a re-enactment of the 1799 law with minor changes; basically Congress made the 1799 statute permanent. 2 Stat. 139 (1802).

In 1817 Congress amended the Intercourse Act of 1802 and this amendment filled some of the jurisdictional gaps with regard to Indian offenses. 3 Stat. 383 (1817). The pertinent provisions of this amendment were sections 1 and 2.

> Sec. 1 That if *any Indian, or other person or persons,* shall, within the United States, and within any town, district, or territory, belonging to any nation or nations, tribe or tribes, of Indians, commit any crime, offense, or misdemeanor, which if committed in any place or district of country *under the sole and exclusive jurisdiction of the United States,* would by the laws of the United States, be punished with death, or any other punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offenses, if committed within any place of district of country *under the sole and exclusive jurisdiction of the United States.* (Emphasis added).
>
> Sec. 2 That the superior courts in each of the territorial districts, and the circuit courts and *other courts of the United States,* of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be first apprehended or brought for trial, *shall have,* and are hereby invested with, full power and authority to hear, try and punish, all crimes * * * against this act; such courts proceeding therein in the same manner as if such crimes, * * * had been committed within the bounds of their respective districts: Provided, That *nothing in this act shall be so construed as to affect any treaty now in force* between the United States and any Indian nation, or to *extend to any offense committed by one Indian against another,*

> within any Indian boundary. (Emphasis added). *Id.* at 383.

Now for the first time the phrase "sole and exclusive jurisdiction of the United States" is used. It is certainly used in the context of defining the crime and punishment, and it might also define jurisdiction. For it is possible to read the jurisdictional language in section 2 as addressing venue; i.e., venue will be proper in any federal court where the offender is apprehended or first brought to trial. Regardless of the construction of section 2, both sections clearly show that jurisdiction over non-Indians was exclusively within the courts of the United States.

The Indian Trade and Intercourse Act was completely revised in 1834, 4 Stat. 729 (1834). The revision was drafted by the House Committee on Indian Affairs and presented as part of a three bill package. H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834), p. 1. The other bills were a bill to reorganize the Department of Indian Affairs, and a bill to establish a Western Territory for the emigrant and other tribes.

Section 25 of the Intercourse Act of 1834 reads as follows:

> That so much of the laws of the United States as provides for the punishment of crimes committed within any place *within the sole and exclusive jurisdiction of the United States,* shall be in force in the Indian country: Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian. (Emphasis added) 4 Stat. 729, 733 (1834).

Section 25 illustrates that in thirty-two years since passage of the 1802 Indian Trade and Intercourse law, Congress had drastically expanded federal jurisdiction over Indian conduct. The 1834 law made Indians fully answerable for all their offenses, except for offenses among Indians. Yet the real significance of section 25 is that it articulates the basic tenets of section 1152, and "within the sole and exclusive

jurisdiction of the United States" defines the crime, the punishment and the jurisdiction. The explicit jurisdictional language contained in earlier versions of the Intercourse Acts is not to be found in the 1834 statute.[122]

Congress passed section 25 to retain criminal jurisdiction over non-Indians exclusively within the federal courts. This intent is manifested in the legislative histories of the 1834 Intercourse Act and the Western Territory bill.

The bill to establish a Western Territory was a part of the package containing the Trade and Intercourse Act. The Western territory bill met with severe criticism and never became law. *See* 10 Cong. Deb. 4764-4779 (1834). Section 9 of the Western Territory bill proposed to license tribes in the Western Territory with concurrent jurisdiction over non-Indians. *See* H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834), pp. 18, 36-37. Congress understood this was the purpose. Former President John Quincy Adams, then Representative Adams, speaking against the bill remarked:

> The bill created a double jurisdiction; it rendered a man liable to be punished twice for the same offense; for one and the same act might be an offense against both codes of law.[123]
> 10 Cong. Deb. 4771 (1834).

The Western Territory bill with its concurrent jurisdiction never became law, and its proposal of concurrent jurisdiction was one of the reasons it failed. The Indian Trade and Intercourse Act on the other hand, passed Congressional scrutiny. Congress enacted the Intercourse Act to retain

[122]To be sure there are references to federal court in the 1834 law, but none as jurisdictionally oriented as the language found in the earlier acts. *See, e.g.* §§ 23,27, 4 Stat. 729,733(1834)

[123]Recognition of the double jeopardy potential inherent in concurrent jurisdiction becomes significant later in petitioners' brief, *infra* at

non-Indians within the exclusive jurisdiction of the courts of the United States, and the House Committee Report so stated:

> In consequence of the change in our Indian relations, the laws relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision. By the act of 3d March 1817, the criminal laws of the United States were extended to all persons in the Indian country, without exception, and by that act, as well as that of 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of *some of our treaties*, and the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction: and it is rather of courtesy than right that we undertake to punish crimes committed in that territory by and against our own citizens. *And this provision [section 25] is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government.* It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits. (Emphasis added) H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834), p. 13.

In short the members of the House Committee were expressing concern about the legality of the jurisdictional scheme contained in the Intercourse Acts of 1802 and 1817. They doubted if Congress had the authority to enact such provisions,[124] and they feared expanding federal jurisdiction into Indian country would impinge upon existing treaties and the territorial act.[125] Nevertheless the Committee chose to

[124]The Committee's concern about authority to control conduct within Indian country has proven unfounded. Sections 1152 and 1153 are ample proof of such authority.

[125]The territorial act referred to may have been the Northwest Ordinance, particularly Article III of that statute, quoted *supra* at

carry these questionable provisions forward and embody them in section 25, *because it was not safe to trust Indian law in 1834.* The Committee embodied these provisions in section 25 because they intended to retain non-Indians within the sole and exclusive jurisdiction of the federal courts. This has to be what the Committee was saying; for concurrent federal jurisdiction would not impinge treaties any more than concurrent federal jurisdiction impinges state sovereignty. *To explain the Committee's concern, the jurisdiction must have been exclusive, and the jurisdiction had to be exclusive because it was not safe to trust Indian law.*

The Trade and Intercourse Act was amended in 1854 to exempt from section 25 Indian offenders who had already been punished by tribal law. 10 Stat. 269 (1854). The purpose of this amendment was to extend double jeopardy protection to Indians. *See* 23 Cong. Globe 700-701 (1854) (Remarks of Rep. Greenwood). Yet in the discussion of this amendment Congress never mentioned including non-Indians. This raises the obvious inference that non-Indians were not subject to tribal jurisdiction; otherwise they too would need double jeopardy protection.

In *Oliphant* the Court of Appeals dismissed this omission of non-Indians as congressional oversight. *Oliphant v. Schlie,* 544 F.2d 1007, 1010 fn. 3 (9th Cir. 1976). But it should be remembered that during the discussion of the Western Territory bill Congress was quick to note that concurrent jurisdiction would subject non-Indians to potential double jeopardy; *supra* at page of brief. Rather than an oversight, Congress did not include non-Indians in the amendment because non-Indians were within the sole and exclusive jurisdiction of the federal courts.

The executive policy behind section 1152 has been consistent with the legislative intent: non-Indians are within the sole and exclusive jurisdiction of the United States tribunals. And when faced with construing a statute, courts

should give great deference to the interpretations given that statute by the officers or agency charged with its administration. *Udall v. Tallman,* 380 U.S. 1, 16 (1964).

The United States Attorney General construed section 25 of the 1834 Intercourse Act as not exposing non-Indians to tribal jurisdiction. 2 *Op. Atty. Gen.* 693 (1834). This opinion was given in 1834 the year in which the statute was enacted, and the Attorney General would certainly have been more attuned to Congress's intent than would the Court of Appeals almost a century and a half later.

The Solicitor of the Department of Interior issued a lengthy memorandum opinion on the powers vested in tribal governments by virtue of section 16 of the Indian Reorganization Act, 25 U.S.C. §476. Specifically the Solicitor focused on the powers tribal governments would acquire under existing federal law, and he concluded that federally organized tribes only had those powers of self-government that had not been terminated by law or waived by treaty. Among which were the powers:

> 6. To remove or exclude from the limits of the reservation non-members of the tribe, excepting authorized Government officials and other persons now occupying reservation lands under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which non-members of the tribe may come upon tribal lands or have dealings with tribal members, *providing such acts are consistent with Federal laws governing trade with the Indian tribes.*
>
> * * *
>
> 8. To administer justice with respect to all disputes and *offenses of or among the members* of the tribe, other than the ten major crimes reserved to the Federal Courts. (Emphasis added) 55 I.D. 14, 65-66 (1934).

This was still the Solicitor's position in 1970: tribal governments have no jurisdiction over non-Indians.[126] 77 I.D. 113, 115 (1970). Additional evidence of the Department of Interior's consistent position that tribal courts lack criminal jurisdiction over non-Indians comes from the law and order regulations promulgated by the Secretary. 25 C.F.R. §§11.1 *et seq.* These regulations establish a Court of Indian Offenses and limit that Court to jurisdiction over offenses committed by Indians. *Id.* at §11.2(a).

To conclude, the legislative history of section 1152 illustrates Congress's steadfast refusal to grant tribal governments criminal jurisdiction over non-Indians. At the same time this history shows that Congress has been equally persistent in expanding federal jurisdiction over offenses of or among Indians. One of the last such expansions was the addition of kidnapping to the Major Crimes Act. 90 Stat. 585 (1976).

The Indian Civil Rights Act of 1968 is another example of such expansion, 82 Stat. 77 (1968). With passage of this law certain due process provisions were extended to "any person" subject to tribal powers of self-government. The act further limited the punishment imposed by tribal courts to a term of six months imprisonment or a fine of $500, or both, 25 U.S.C. §1302; supporters of this measure spoke in terms of *limiting the power of tribal courts in dealing with tribal members. See* 113 Cong. Rec. 13473 (1967) (Remarks of Sen. Ervin); *See* 114 Cong. Rec. 9552-53 (1968) (Remarks of Rep. Reifel).

The fact the Indian Civil Rights Act extended constitutional safeguards to all persons is not a license of tribal jurisdiction over non-Indians. The Bill of Rights protects more than criminal rights, and tribal governments can impinge these

[126]After the District Court's decision in *Oliphant* this opinion was withdrawn. However the Department of Interior has not since taken an inconsistent position.

rights also.[127] Congress passed the Indian Civil Rights Act to afford certain constitutional protections to persons who might be subject to tribes exercising their powers of self-government.[128] Since it is impossible to anticipate all instances in which such power will be exercised, Congress legislated in terms of "any person". To "bootstrap" the "any person" language into a license of jurisdiction is not in accord with the legislative history of section 1152.

Section 25 of the Indian Trade and Intercourse Act of 1834 was passed to retain non-Indian offenders within the sole and exclusive jurisdiction of the United States. The provisions of section 25 were carried forward and eventually codified as section 1152 of Title 18, United States Code. *See* Revised Statutes of 1873, sections 2145 and 2146; *See* sections 217 and 218 of Title 25, United States Code, 1940 ed. Section 1152 therefore should be considered as a continuance of the former statute (section 25), and of the policy and interpretations given that statute. 82 C.J.S. Statutes §276. In 1834 it certainly would not have been the policy of Congress to license Indian peoples with concurrent jurisdiction over United States citizens, and regardless of how bigoted it seems in retrospect, this Court is limited by the legislative intent of 1834. *See* 10 Cong. Deb. 4775-77 (1934) (Remarks of Rep. Archer); *Cf.* Sen. Rep. No. 461, 29th Cong., 1st Sess. (1846) (discusses amending section 25 to bring offenses among Indians within the jurisdiction of the United States because "murders and outrages of almost every

[127]For example, the Indian Civil Rights Act of 1968 would apply to the proposed Suquamish construction moratorium. (See appendix to brief page 47a-58a)

[128]The Indian Civil Rights extended limited constitutional protections to Indians, it was not a curtailment of rights as to non-Indians. Non-Indians enjoy the full panoply of constitutional rights, discussed *infra* at .

description have continued to be committed among them").

Finally, even if Congress intended section 25 to license Indian governments with concurrent jurisdiction over non-Indians, such a license would have been unconstitutional. At this time constitutional rights did not extend to Indians before tribal courts, *Talton v. Mayes*, 163 U.S. 376 (1896), but there was no such reduction or loss of rights with respect to non-Indians. Non-Indians would have been entitled to all their rights as guaranteed by the Constitution, and tribal courts would have deprived non-Indians of these rights. If Congress itself could not deprive citizens of these fundamental rights, how could it through exercise of its plenary power over Indians license tribal authorities to do so?

Moreover this constitutional infirmity was not cured by the Indian Civil Rights Act. The Indian Civil Rights Act only extended limited constitutional protections to persons before tribal courts. 25 U.S.C. §1302. In *Oliphant* Judge Sharp determined that non-Indians were only entitled to those due process rights set out in the Indian Civil Rights Act. (A. 52). Petitioners vehemently disagree with this determination. Non-Indians before tribal courts are entitled to the full panoply of constitutional rights. Among which are the right to vote and participate in local government; the right to a trial by jury of your peers; the right to counsel; and the right to only be governed by those laws enacted through a legislature elected by your peers.[129]

B. The Suquamish Do Not Have Criminal Jurisdiction Over Non-Indians Pursuant To Treaty.

As previously discussed section 1152 of Title 18, United States Code, provides that criminal jurisdiction may reside in

[129]Petitioners will expand this argument, *infra* at 109.

tribal authorities where "*by treaty stipulations, the exclusive jurisdiction over such offenses* is or may be secured to the Indian tribes respectively"; *supra* at . (Emphasis added). Accordingly unless jurisdiction over non-Indians is exclusive and licensed expressly by treaty, section 1152 is controlling and non-Indians remain within the sole and exclusive jurisdiction of the United States.

A treaty was signed with the Suquamish in 1855, and a land cession agreement in 1905, neither of which contain any specific reference to tribal jurisdiction over non-Indians. 12 Stat. 927 (1859); 33 Stat. 1078 (1905). In fact the only potential vehicle for Suquamish authority over non-Indians is the following language found in Article II of the 1855 treaty:

> [N]or shall any white man be permitted to reside upon the same [reserved lands] without the permission of the said tribes * * *.
> 12 Stat. 927, 928 (1859).

Article II would certainly give the Suquamish the power to exclude unauthorized persons from the Port Madison Reservation,[130] but given the dictates of section 1152 (exclusive jurisdiction by treaty stipulation), silence cannot be construed as a license of tribal jurisdiction over non-Indians. A review of other Indian treaties supports this conclusion.

In the treaty of 1785 with the Cherokees, Congress did license a limited jurisdiction over non-Indians. The extent of this license is shown by the following articles contained in that treaty:

> Article V. If any citizen of the United States, or other person not being an Indian, *shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted to the Indians for*

[130]In view of the Indian Civil Rights Act it is doubtful if the Suquamish could exclude non-Indians owning property on the Port Madison Reservation, and petitioners submit the United States Constitution also precludes such exclusion.

their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please: Provided nevertheless, That this article shall not extend to the people settled between the fork of the French Broad and Holstein rivers, whose particular situation shall be transmitted to the United States in Congress assembled for their decision thereon, which the Indians agree to abide by.

Article VI. If any Indian or Indians, or persons residing among them, or who shall take refuge in their nation, shall commit a robbery, or murder, or other capital crime, on any citizen of the United States, or persons under their protection, *the nation, or the tribe to which such offender or offenders may belong, shall be bound to deliver him or them up to be punished according to the ordinances of the United States;* Provided, that the punishment shall not be greater than if the robbery or murder, or other capital crime had been committed by a citizen on a citizen.

Article VII. *If any citizen of the United States, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian; such offender or offenders shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States;* and the punishment shall be in the presence of some of the Cherokees, if any shall attend at the time and place, and that they may have an opportunity so to do, due notice of the time of such intended punishment shall be sent to some of the tribes. (Emphasis added). 7 Stat. 18, 19 (1785)

It is apparent from Article V of the 1785 Cherokee Treaty that the Indians were only licensed to punish non-Indians for settling or attempting to settle on tribal lands. Article VII retained general criminal jurisdiction over non-Indians in either the states or the United States, and Article VI deprived the Cherokees of jurisdiction over their own tribal members

for certain offenses against non-Indians. Other early treaties contain similar articles and they illustrate that even a limited license over non-Indians was clearly spelled out by treaty. *See, e.g.*, Treaty with Choctaws, 7 Stat. 21 (1786); Treaty with Chickasaws, 7 Stat. 24 (1786); Treaty with Wyandots, 7 Stat. 16 (1785).

It is also apparent that by the 1830's this limited license was no longer being granted. Compare, for example, Article V of the treaty of 1785 with Article V in the Cherokee Treaty of 1835:

> Article 5. The United States hereby convenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: *provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.* (Emphasis added) 7 Stat. 478, 481 (1835).

Another example of Congress's refusal to license tribal governments with jurisdiction over non-Indians can be found in Article IV of the Choctaw Treaty of 1830. 7 Stat. 333 (1830):

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of [illegible] People, the jurisdiction and government of all the

persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, *not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress,* to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs. *But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws, any white man who shall come into their nation, and infringe any of their national regulations.* (Emphasis added)

The fact the Choctaws asked Congress to license tribal jurisdiction over non-Indians is evidence that no such jurisdiction could exist absent Congressional license. Furthermore, Congress did not accede to the request. Instead Congress enacted section 25 of the Indian Trade and Intercourse Act of 1834, quoted supra at .

Relying upon Article IV in their treaty, in 1834 the Choctaws attempted to punish a slave owned by non-Indians for offenses within Indian country. In a memorandum to the Secretary of War, the United States Attorney General opined that section 25 of the Intercourse Act deprived the Choctaw of jurisdiction in the matter. 2 *Op. Atty. Gen.* 693 (1834).

In 1855 the Attorney General was again called upon to render an opinion on Article IV of the Choctaw Treaty, This time the issue was criminal jurisdiction over a non-Indian adopted by the tribe. On the basis of section 25 the Attorney General concluded the Choctaws had no jurisdiction. 7 *Op. Atty. Gen.* 174 (1855). This opinion was given in the same year the Suquamish Treaty was signed. In view of this

contemporaneous refusal of jurisdiction to the Choctaws, how can it be argued that silence gives the Suquamish the license they now assert?

Silence does not bring the Suquamish within the purview of the third exception contained in section 1152: *exclusive jurisdiction by treaty stipulation.* Moreover, under the guise of interpretation, a court cannot create an authority where none exists. *Confederate Bands of Ute Indians v. United States,* 330 U.S. 169, 179 (1947); *Choctaw Nation v. United States,* 318 U.S. 423, 431-432 (1943).

In conclusion, again it must be remembered that not until passage of the Indian Civil Rights Act of 1968 were *any* constitutional safeguards *assured* to persons before tribal courts. Consequently even if a treaty had explicitly licensed the Suquamish with jurisdiction over non-Indians, such a license would have been constitutionally invalid. Treaties cannot contravene the Constitution, *Asakura v. Seattle,* 265 U.S. 332, 341 (1924); and such a license would serve to deprive non-Indian citizens of their constitutional rights. Non-Indians are entitled to the full spectrum of constitutional rights, and not just the limited version contained in the Indian Civil Rights Act. If Congress could not deprive non-Indian citizens of their right to due process of laws by statutory enactment, Congress could not indirectly do so by treaty with the Suquamish.[131]

C. The Suquamish Tribal Law and Order Code Has Not Been Enacted In Accordance With the Regulations Promulgated by the Secretary.

In 1973 the Suquamish passed their Law and Order Code to regulate conduct by all persons within the Port Madison

[131]See page 109, *infra*, for discussion of due process and jurisdiction.

Reservation, Indian and non-Indians alike.[132] (Appendix to brief page 21a). The code covers a variety of offenses, everything from assault, bigamy and rape, to theft. According to this code a tribal court is to be established and given jurisdiction over criminal matters; civil actions in which the defendant is found within the reservation; all actions involving domestic relations; and Indian probates. It is further provided that the tribal court's jurisdiction shall be concurrent and not exclusive with respect to any offense over which federal or state courts may also have jurisdiction.

Defendants are entitled to a trial by jury, but the code was amended by Tribal Resolution No. 77-065 to exclude non-Indians from the jury panel.[133] (Appendix to brief page 65a)

Tribes organizing under section 16 of the Indian Reorganization Act of 1934 are required to have their tribal constitution approved by the Secretary, and tribal constitutions are not effective until so approved. 25 U.S.C. §476; 25 C.F.R. §52.7 (1976).

The Secretary has promulgated regulations governing law and order on reservations. 25 C.F.R. §§11.1 *et seq.* (1973). These regulations establish a Court of Indian Offenses and license that Court with jurisdiction only over Indian offenders. *Id.* at §11.2(a). Section 11.1(d) of these regulations refers to those tribes, like the Suquamish, who are organized and pass their own tribal codes.

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[132]The Suquamish Constitution only permits tribal members to vote, and there are only twenty-two eligible voters on the reservation. (A.46) Therefore the Law and Order Code was enacted by less than one per cent of the reservation population.

[133]Excluding tribal judges, tribal police officers and minors from the jury panel, there only remain approximately sixteen potential jurors. Thus all defendants would be assured of having essentially the same jury.

> Sec. 11.1(d). The regulations in this part *shall continue to apply* to tribes organized under the act of June 18, 1934 * * * [Indian Reorganization Act], *until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective;* * * *. (Emphasis added).

It is further provided in section 11.1(e) of the regulations:

> Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and *after such ordinances have been approved by the Secretary of the Interior they shall be controlling,* and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe. (Emphasis added).

Clearly the Secretary's regulations governing law and order on reservations are applicable in part to tribes exercising powers of self-government pursuant to the Indian Reorganization Act. This is evident from the above emphasized language in sections 11.1(d) and 11.1(e). It is equally clear from these regulations that tribal law and order codes must comply with the tribal constitution as approved by the Secretary, and that the law and order code must also be approved by the Secretary. Otherwise the Secretary's law and order code is in effect, with its Court of Indian Offenses and jurisdiction only over Indian offenders.

Under Article III of the Suquamish Constitution is found section (h), the only power to impose criminal sanctions reserved to the tribe and approved by the Secretary.

> Sec. (h). To promulgate and enforce ordinances which shall be subject to approval by the Secretary of the Interior *governing the conduct of members of the Suquamish Indian Tribe* regarding hunting, fishing and shell fishing.

The Suquamish Constitution is in compliance with federal law: it only licenses the tribe with jurisdiction over offenses of or among tribal members. The Secretary approved the Suquamish Constitution.

The Suquamish Law and Order Code is not in compliance with the tribal constitution insofar as it subjects non-Indians to tribal jurisdiction. The Law and Order Code has never been approved by the Secretary, nor is such approval likely in view of the Department of Interior's consistent position that non-Indians are not subject to tribal jurisdiction, *supra* at .

Absent the Secretary's approval the Suquamish Law and Order Code is not within the substantive and procedural guidelines set forth in 25 C.F.R. §§11.1(d), 11.1(e) and 52.7. The code is not in compliance with the tribal constitution as approved by the Secretary; it was not approved according to the procedures established by the Secretary; and the code is beyond the scope of authority licensed the Suquamish by law i.e., to regulate conduct of or among tribal members. Therefore the Secretary's law and order regulations are still in effect, thus, the only tribal court must be a Court of Indian Offenses, and jurisdiction of that Court extends only to Indian offenders.

D. The Suquamish Code Is Contrary to the Congressional Policy Inherent In 18 U.S.C. 1152 and 18 U.S.C. 13.

Section 1152 subjects non-Indians to the general laws of the United States, but it is only a portion of the legislative plan to deal with non-Indian conduct within Indian country. The Assimilative Crimes Act, 18 U.S.C. §13, forms the other portion.

> Sec. 13. Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Section 13 is intended to conform the criminal law of federal enclaves to that of local law, *United States v. Sharpnack*, 355 U.S. 286, 289-295 (1958), and it extends to Indian country. *Williams v. United States*, 327 U.S. 711, 713 (1946). The net effect of sections 1152 and 13 is comprehensive federal criminal jurisdiction over non-Indians for offenses within Indian country. In other words, not only are non-Indians subject to the general federal enclave laws by section 1152, but section 13 subjects them to prosecution for violations of state law as well.

In the present case the thoroughness of this federal jurisdiction is evident. Oliphant could have been charged under section 1152 for violation of sections 111, 113 and 1114 of Title 18, United States Code. In addition he could be prosecuted under 18 U.S.C. §13 for violations of the following Washington statutes: RCW 9A.36.040, simple assault; RCW 9A.36.030, assault in the third degree; RCW 9A.76.040, resisting arrest; and RCW 9A.76.020, obstructing a public servant. Likewise Belgarde would have similar exposure under section 13: RCW 46.41.400, driving too fast for conditions; RCW 46.41.500, reckless driving; RCW 46.61.525, negligent driving; RCW 46.41.445, failure to exercise due care; RCW 46.41.210, failure to yield to a police vehicle; RCW 9A.36.050, reckless endangerment; RCW 9A.36.040, simple assault; and RCW 9A.76.020, obstructing a public servant.[134]

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[134]The failure to prosecute Oliphant and Belgarde under section 13 does not indicate that a jurisdictional vacuum exists within Indian country. The vacuum is one of enforcement as to minor offenses by non-Indians. The vehicles for enforcement are present in 18 U.S.C. §§ 1 and 3401, and it is up to the federal courts to routinely designate special commissions to handle these less important cases. *See The Indian, America's Unfinished Business*, Brophy and Aberle (1966), p.50.

Admittedly some of the foregoing Washington statutes were not in effect when Petitioners were arrested by the tribal police. Nevertheless this illustrates that the comprehensiveness of federal jurisdiction is a growing one, and with each session of the state legislature it is expanded.

On the other hand federal jurisdiction is not so comprehensive with respect to Indians. Sections 1153, 1152 and 13 do not apply to minor offenses among Indians; minor offenses where the Indian offender has been punished by tribal law; and to instances where treaty stipulation licenses tribal authorities with exclusive jurisdiction over the offense.[135] *See United States v. Sosseur*, 181 F.2d 873, 875-876 (7th Cir. 1950); *Acunia v. United States*, 404 F.2d 140, 142, (9th Cir. 1968). Congress intended the jurisdictional gaps left by these exceptions to be filled by tribal authorities, either through the Court of Indian Offenses and the Secretary's law and order code, 25 C.F.R. §§11.1 *et seq.*, or pursuant to tribal law and order codes as authorized by the Indian Reorganization Act and the Secretary. 25 U.S.C. §476; 25 C.F.R. §§11.1(d), 11.1(e) and 52.7.

The existence of such a comprehensive scheme indicates a congressional policy to deal differently with non-Indian offenders. Criminal conduct by non-Indians is governed exclusively by federal law, while Indian governments are left to regulate minor offenses of or among tribal members. Given this Congressional intent to retain exclusive jurisdiction over non-Indians, insofar as it subjects non-Indians to tribal jurisdiction, the Suquamish code is contrary to the legislative policy behind sections 13 and 1152 of Title 18, United States Code.

These same policy considerations and exhaustiveness of federal legislation would also indicate that Congress intended to pre-empt tribal governments in the area of non-Indian

[135]General federal criminal statutes still apply to Indians however.

offenders. *Cf. Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965). Furthermore the fact that tribal rather than state authority is involved does not make pre-emption an inapplicable doctrine.

If Indian tribes are in fact sovereign, they are still subject to the political control of the United States, *Cherokee Nation v. Georgia*, 5 Pet. 1, 30 U.S. 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886); and must submit, as do states, to the legislation of constitutionally delegated Congressional power over Indian land. To hold that federal jurisdiction over Indian land is exclusive as to the state, but concurrent with tribal jurisdiction discriminates against the natural sovereign rights of state citizens. The law is that the power of the federal government over Indian country, whether viewed as deriving from the commerce clause of federal ownership, is exclusive and not concurrent with state power. Justice demands the same rule be applied to tribal power as well.

E. Assertion of Jurisdiction Over Petitioners in This Case Would Constitute A Denial of Due Process.

The Petitioners have consistently argued this case on both jurisdictional and due process grounds: that the Suquamish were without power to try non-Indians for violations of the tribal code, and that even if the Suquamish theoretically could assert jurisdiction over non-Indians they could not in this case because to do so would violate the Petitioners' constitutional right to due process of law. The Circuit Court rejected petitioner Oliphant's jurisdictional argument but it did not rule on the due process claim.[136] Likewise the District

[136]Again the only finding the Court of Appeals made as to due process concerned exclusion of non-Indians from the venire. The Court did not consider deprivations of due process as depriving the tribal court of jurisdiction; *supra* at 1011-1012, 544 F.2d 1007.

Court rejected petitioner Belgarde's jurisdictional argument and also found his due process contentions either frivolous or premature. Certiorari was only granted on the question of tribal jurisdiction over non-Indians. However, if the Court determines that the Suquamish could assert jurisdiction over Petitioners, their due process contentions must be confronted.

This aspect of the argument can perhaps be better understood by analogizing the situation presented here with the rules set forth by this Court in the long-arm jurisdiction cases. It is established that the limit on a state's jurisdiction is when assertion of jurisdiction would be a denial of due process. In each case, the facts are examined to determine first, whether under the laws of that state jurisdiction may be assumed, and second, whether the assumption of jurisdiction would offend "traditional notions of fair play and substantial justice". *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *McGee v. International Life Insurance Company*, 355 U.S. 220 (1957). If the Court in this case decides that jurisdiction is authorized by law (either by inherent power, statute, or treaty), the next question should be whether the assertion of jurisdiction over these defendants in these cases would so offend traditional notions of fair play and substantial justice as to constitute a denial of due process.

Using this analysis, the first issue that must be resolved is what are Petitioners' due process rights in Indian tribal courts. As previously discussed, *Talton v. Mayes*, 163 U.S. 376 (1896), held that *Indians* before tribal courts were not under the protection of the United States Constitution.[137] No such

[137]The decision in Talton, rendered in 1896, reflects an attitude towards the Indians that probably would not be repeated today. However, the decision has never been judicially overturned (although its effect has been reduced by the Indian Civil Rights Act), and therefore the rights of Indians before tribal courts remain curtailed by the *Talton* decision as modified by the 1968 law. The question here, however, concerns the rights of non-Indian offenders before tribal courts, a question never directly dealt with by this Court or Congress.

limitation has been imposed upon the rights of non-Indian defendants, either by Court decision or by statute. The Court in *Talton* reasoned that Indians were not protected because:

> It follows that as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government. *Id.* at 384.

The Indian Civil Rights Act of 1968 was passed, in part, to *extend* limited constitutional rights to Indians before tribal courts. However, a determination that non-Indians are *only* entitled to those rights enumerated in the Indian Civil Rights Act would be a *deprivation* of those other constitutional rights of non-Indian citizens which are not covered by the Indian Civil Rights Act, but which have been established and recognized by this Court.[138]

Petitioners contend, therefore, that they are entitled to full panoply of rights guaranteed them under the Constitution as interpreted by this Court. They also contend that if jurisdiction were assumed by the Suquamish over them, many of those constitutional rights would be violated.

Non-Indians residing on the Port Madison Reservation are not entitled to vote in tribal elections, they cannot hold tribal office (including tribal law enforcement), they have no say in the passage of laws governing their conduct (including the tribal Law and Order Code that is before the Court), and they are denied the right to serve on tribal juries.[139] Twenty-two

[138]In the District Court decision Judge Sharp held that Oliphant had been accorded all the protections guaranteed by the Indian Civil Rights Act of 1968. (A.52).

[139]These are some of the due process denials that concern the issue of jurisdiction, they are not all the due process denials involved in these cases. The record is replete with others. Petitioners wish to preserve such denials of due process for post conviction relief in the event the Court finds for the Suquamish on the issue of jurisdiction.

Indians decide what laws are passed, administer the tribal government, and prosecute and judge any of the three thousand non-Indians who they determine have violated a tribal ordinance. To be held criminally liable for alleged violations of laws enacted and enforced by a government so constituted strikes at the very roots of our democratic system. Limitations of time and space make it impractical for Petitioners to thoroughly explore the law and develop the argument on this issue. Suffice it to say that if the Court does conclude that jurisdiction over non-Indians is authorized, Petitioners seek an additional ruling that the assumption of jurisdiction over them in this case would be a denial of due process.

III.

WHETHER THE SOVEREIGN CRIMINAL POWER AND JURISDICTION THAT THE SUQUAMISH INDIAN TRIBE MAY HAVE HAD OVER CRIMINAL OFFENSES BY OR AGAINST NON-INDIANS IN THE STATE OF WASHINGTON WAS TERMINATED BY THE LAWS OF CESSION OF THAT POWER BY THE UNITED STATES TO THE STATE OF WASHINGTON, COUPLED WITH THE ACCEPTANCE BY THE LAWS OF THE STATE OF WASHINGTON OF THAT POWER AND THE PETITION AND CONSENT OF THE TRIBE TO SUCH CESSION AND ACCEPTANCE OF JURISDICTION PRIOR TO THE EXERCISE OF SUCH POWER BY THE TRIBE.

Federal power over Indian country is plenary. *Colliflower v. Garland,* 342 F.2d 369, 377 (9th Cir. 1965). This power may be delegated to the states. *Anderson v. Gladden,* 293 F.2d 463 (9th Cir. 1961); and Congress undertook such a

delegation in 1953 with passage of Public Law 83-280 (Public Law 280). 67 Stat. 588 (1953).[140]

This law made assumption of civil and criminal jurisdiction over Indian country mandatory as to certain states, and optional for others. Section 2 was the mandatory criminal jurisdiction provision and it stated in part:

> Each of the States listed in the following table [California, Minnesota, Nebraska, Oregon and Wisconsin] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State *to the same extent* that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State *shall have the same force and effect* within such Indian country as they have elsewhere within the State. (Emphasis added) 67 Stat. 588 (1953).

Section 2(b) excepted certain subject areas from state control; e.g., hunting and fishing regulations were retained within tribal control.

Section 4 dealt with mandatory civil jurisdiction by the same states enumerated in section 2, and section 4(c) contained the only reference to concurrent tribal authority found in the act:

> Sec. 4(c). Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. *Id.* at 589.

However this concurrence was not really a jurisdictional concurrence. That is state courts were to apply tribal laws,

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[140]Petitioners do not contend that the sole basis for the valid exercise of state jurisdiction is Public Law 280. Indeed, the jurisdictional history shows that state jurisdiction was exercised prior to the passage of that Act. See Brief of Kitsap County, *amicus*, filed herein.

but section 4(c) did not license tribal courts with concurrent jurisdiction.

The specific reference to concurrent state-tribal authority in section 4(c), and the exceptions to mandatory criminal jurisdiction in section 2(b) indicate that "mandatory" states otherwise acquired exclusive jurisdiction over Indian country. If this were not so, Congress would not have provided the exceptions and reservations contained in sections 4(c) and 2(b). This construction is further supported by the subsequent legislative history of section 2.

Section 2 was amended in 1958 to include Alaska, 72 Stat. 545 (1958). Prior to this amendment the Metlakatla Indians had established a tribal court system to deal with minor offenses by tribal members; the inclusion of Alaska in section 2 "had the effect of eliminating the legal basis for the jurisdiction exercised by the [Metlakatla] community over minor offenses." H.R. Rep. No. 91-1545, 91st Cong., 2d Sess., reprinted U.S. Code Cong. & Ad. News, 4784 (1970).

Consequently Congress again amended section 2 in 1970 to withdraw the Metlakatla from exclusive state jurisdiction, 84 Stat. 1358 (1970). This amendment was passed to enable the Metlakatla Indians to exercise concurrent jurisdiction with the State of Alaska over minor offenses by tribal members.[141] H.R. Rep. No. 91-1545, *supra* at 4783, 4787. This amendment clearly indicates that section 2 extinguished any tribal concurrent jurisdiction.

The "optional" states were governed by sections 6 and 7 of Public Law 280.

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State

[141]Petitioners wish to point out that Congress did not avail itself of this opportunity to extend concurrent jurisdiction over non-Indian minor offenders.

> to amend, where necessary, their State constitution or existing statutes, as the case may be, *to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, *to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.*
> Approved August 15, 1953.
> (Emphasis added). 67 Stat. 588, 590 (1953)

There is nothing in Public Law 280 to indicate that "optional" states acquired less jurisdiction than the "mandatory" states; i.e., concurrent with the tribes as opposed to exclusive. Statutory provisions in the same act are *in pari materia* and should be construed as a unit. 73 Am. Jur. 2d Statutes §§187-191. Also equality of statehood is the rule, and Public Law 280 should be construed as vesting both the "optional" and "mandatory" states with the same exclusive jurisdiction. *See Draper v. United States,* 164 U.S. 240 (1896)

Pursuant to Public Law 280 the Washington legislature enacted chapter 240, Laws of 1957. This statute provided in part:

> SECTION 1. The state of Washington hereby obligates and binds itself to assume, as hereinafter provided, *criminal and civil jurisdiction over Indians and Indian territory,* reservation, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

> SEC. 2. Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state of Washington to the extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservation, country, and lands of the Indian body involved in accordance with the provisions of this act: * * *
> (Emphasis added).

Shortly thereafter, in 1958, the Suquamish Tribal Council passed a resolution asking the State of Washington to assume civil and criminal jurisdiction over all persons on the Port Madison Reservation.[142] May 15, 1958, Governor Rossellini proclaimed:

> The criminal and civil jurisdiction of the State of Washington shall apply to the Suquamish Indian people, their reservation, territory, lands and country, *and all persons* being and residing therein. (Emphasis added). (Appendix to brief page 60a-61a).

Thus Washington assumed the exclusive criminal and civil jurisdiction over all persons within Port Madison as authorized by Public Law 280. *See State v. Paul,* 53 Wn.2d 789, 337 P.2d (1959), *cert. dismissed,* 361 U.S. 898 (1959).

Yet assuming the Suquamish are not held to have surrendered to the exclusive jurisdiction of Washington by virtue of the 1958 tribal resolution and gubernatorial proclamation, the State subsequently acquired jurisdiction over non-Indians with enactment of Laws of 1963, chapter 36. RCW 37.12.010.

This 1963 law amended in part and repealed in part the 1957 state statute, and it reads as follows:

[142]This resolution was passed by unanimous vote of twenty-one members. (Appendix to brief pages 58a-59a).

> The state of Washington hereby obligates and binds itself to *assume criminal and civil jurisdiction over Indians and Indian territory,* reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction *shall not apply to Indians when on their tribal lands* or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:
>
> (1) Compulsory school attendance;
> (2) Public assistance;
> (3) Domestic relations;
> (4) Mental illness;
> (5) Juvenile delinquency;
> (6) Adoption proceedings;
> (7) Dependent children; and
> (8) Operation of motor vehicles upon the public streets, alleys, roads and highways; *Provided further, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.* (Emphasis added).

With this amendment the Washington legislature, without executive proclamation, assumed exclusive criminal and civil jurisdiction over all persons within Indian country,[143] *except Indians* on tribal trust lands where none of the eight subject categories were involved. Petitioners are non-Indians and therefore within the exclusive jurisdiction of the State. This is necessarily so because the only jurisdiction not assumed by Washington in 1963 was over Indians on trust lands.

[143]The Washington State Attorney General has stated the jurisdiction assumed pursuant to the 1963 law was exclusive and not concurrent with tribal jurisdiction. AGO 63-64, No. 68.

The 1963 statute also provided that tribes *such as the Suquamish*, who came under Washington jurisdiction prior to the amendment were not to be affected. It is Petitioners' position that the State of Washington either assumed jurisdiction over all persons on the reservation in 1958, or assumed jurisdiction over non-Indians in 1963.[144]

[144]In a recent decision the Ninth Circuit, *en banc* ruled the 1963 Washington statute was unconstitutional, *Confed. Bands & Tribes, Etc. v. State of Wash.*, 552 F.2d 1332 (9th Cir. 1977). This action involved a challenge by Indians, on due process and equal protection grounds, to the statute's partial assumption of jurisdiction as to fee versus non-fee Indians. The Court reasoned that notwithstanding its racial implications, the statute's impact was limited to Indian reservations therefore a rationality test was applied. The Court went on to say such partial assumption of jurisdiction with respect to Indians was irrational, and because the invalid portions of the statute could not be severed the entire law was struck down. Petitioners' contend the Court of Appeals' decision is not binding upon them for the following reasons.

First, the question of due process and equal protection of non-Indians was not before the Court; the Circuit Court couched its opinion solely in terms of Indian rights. Moreover, Indians have no standing to challenge the Washington law on the issue of non-Indians rights.

Second, non-Indians were not party to that case and could not appeal the decision.

Lastly, there can be no doubt of the Washington Legislature's intent to assume jurisdiction over all non-Indians, this was the effect of RCW 37.12.010. Furthermore such an assumption was authorized by 25 U.S.C. § 1323, and constitutionally permissible. *Cf. United States v. Antelope*, 97 S.Ct. 1395(1977). Given the intent of the Washington Legislature to assume total jurisdiction over non-Indians and the constitutionality of such an assumption, the offending portions should be severed without invalidating the entire statute. Therefore, with enactment of RCW 37.12.010 Washington assumed jurisdiction over all non-Indians within the Port Madison Reservation.

IV.

WHETHER, IF SUCH CRIMINAL POWER AND JURISDICTION THE SUQUAMISH INDIAN TRIBE MAY HAVE HAD OVER CRIMINAL OFFENSES BY NON-INDIANS HAD TERMINATED AS PROVIDED IN QUESTION III HERETO, SUCH TERMINATION WAS RESCINDED UPON SUBSEQUENT PROCLAMATION BY THE GOVERNOR OF THE STATE OF WASHINGTON PROVIDING FOR RETROCESSION OF THE CRIMINAL JURISDICTION OF THE STATE OF WASHINGTON TO THE UNITED STATES WITH LIMITATIONS THEREIN BY REFERENCE TO THE LAWS OF THE STATE OF WASHINGTON, AND THE ACCEPTANCE OF RETROCESSION BY THE SECRETARY OF INTERIOR OF THE UNITED STATES, LIMITING SUCH ACCEPTANCE TO THOSE LAWS AS PROVIDED IN THE GOVERNOR'S PROCLAMATION.

In 1968 Congress authorized the United States to take back, via retrocession, from any state "*all or any measure*" of jurisdiction acquired pursuant to Public Law 280. (Emphasis added) 82 Stat. 79; 25 U.S.C. §1323. On November 12, 1968, President Johnson, by executive order, designated the Secretary to accept any such retrocession by publication in the Federal Register of the jurisdiction retroceded and the effective date.[145]

January 11, 1971, by a unanimous vote of twenty-nine members the Suquamish resolve to have jurisdiction returned to the United States. (Appendix to brief pages 60a-61a). The same year the governor, *without legislative approval*, issued a proclamation retroceding jurisdiction to the United States,[146]

[145]Executive Order No. 11435, 33 F.R. 17339.

[146](Appendix to brief pages 62a-64a).

except as provided for in the Laws of 1963, chapter 36, quoted *supra* at .

The Secretary duly accepted retrocession in 1972 *as qualified* by the governor. 37 F.R. 7353 (Appendix to brief page 64a).

Petitioners contend that: (1) the governor's unilateral retrocession was contrary to the powers licensed the executive branch under the Washington State Constitution and therefore void *ab initio;* and (2) even if the retrocession was valid, Washington did not surrender jurisdiction over non-Indians.

A. The Governor's Unilateral Retrocession Was Contrary to the Powers Licensed the Executive Branch Under the Washington State Constitution and Therefore Void *Ab Initio*.

The powers delegated to the governor under Article III of the Washington Constitution do not include a unilateral power to repeal laws. The state legislature is empowered to enact, amend and repeal laws. RCW Const. Art. II; RCW Const. Amend. XXVI.

By the Laws of 1957, chapter 240, the legislature authorized the governor, by proclamation, to assume jurisdiction over Indian country, quoted *supra* at 115. The power to assume jurisdiction does not necessarily carry with it the power to retrocede jurisdiction.[147]

In *Oliphant* the Circuit Court held that validity of this unilateral retrocession was a matter of state law, but the effect of the retrocession was a question of federal law. The Court went on to conclude that retrocession was effective when accepted by the Secretary regardless of the invalidity of

[147]The Washington Attorney General concluded the governor could not unilaterally retrocede jurisdiction once it had been validly assumed. AGO 1972 No. 9 (*Belgarde* R.78 Exhibit H).

the governor's proclamation as a matter of state law, *supra* at 1012, 544 F.2d 1007. In support of this conclusion the Court of Appeals in *Oliphant* relied upon *United States v. Brown*, 334 F. Supp. 536 (D.C. Neb. 1971) and *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823 (D.C. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972).

Brown dealt with retrocession by the Nebraska legislature without the governor's approval. The Court held that such unilateral retrocession was invalid under the state constitution, but Judge Denney went on to say that on the basis of *Lesser v. Garnett*, 258 U.S. 130 (1922), once the Secretary accepted the retrocession it was binding. In effect the Court in *Brown* was analogizing retrocession to a contract action: the legislature's retrocession appeared valid on its face; it is difficult to require the Secretary to delve into the workings of state government; therefore, the Secretary must rely upon what appears to be valid state action. *Id.* at 540.

Even without the authority of *Lesser v. Garnett*, Judge Denney determined the retrocession was still effective because in the exercise of its plenary power over Indians, Congress could have taken back the jurisdiction without state consent:

> The federal government having the power to preempt jurisdiction over the Omaha Reservation, had the power to so define and construe the word 'retrocession' as to remove from determination of federal assumption of jurisdiction any question of the procedural validity or invalidity of the state's act of retrocession. *Id.* at 541.

The second case, *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823 (D.C. Neb. 1971), involved the same Nebraska retrocession and it too relied upon *Lesser v. Garnett* in deciding the issue. The *Omaha* Court reasoned that the Secretary's duties were ministerial; hence:

> The Secretary was not authorized to investigate the procedural or technical validity of every notice he received. In this writer's opinion once the Secretary received from the state officials what appeared to be an

> official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute. *Id.* at 832.

Petitioners submit that insofar as the Court of Appeals in *Oliphant* relied upon *Brown* and *Omaha* it erred in the following particulars. First, admittedly Congress could have taken back all state jurisdiction over Indian country without any consent on behalf of the respective states. However Congress chose not to do this. Instead Congress delegated the decision to the states. By this delegation Congress intended that the individual states analyze the question of jurisdiction over Indian country, and determine what if any portion of their jurisdiction would be best returned to the United States. Had Congress intended otherwise it would have taken back all jurisdiction without state participation. Thus the validity of the state act of retrocession is relevant in determining what jurisdiction is in fact returned to the United States, because Congress is depending upon the various state governments to decide in the best interest of all peoples concerned.

Second, the Secretary's duties are not purely ministerial, and he does have the authority to delve into the validity of state acts of retrocession. This is so because 25 U.S.C. §1323 authorizes states to retrocede all or any portion of their jurisdiction, and the Secretary is empowered to accept all or any portion of the jurisdiction retroceded. *United States v. Brown*, 334 F. Supp. 536, 542-543 (D.C. Neb. 1971); *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823, 834-835 (D.C. Neb. 1971). Since the Secretary has the discretion to decide how much jurisdiction to accept, his duties are not ministerial. Presumably his exercise of this discretion will be an intelligent purposeful one: founded on the desires of the state as well as the peoples involved. This necessitates his looking beyond the form of retrocession into the substance of it.

Lastly, Petitioners respectfully submit that *Lesser v. Garnett*, 258 U.S. 130 (1922), is of questionable authority. *Lesser* concerned an attack upon the Nineteenth Amendment, women's sufferage. The Secretary of State received notice that the requisite number of states had ratified the amendment, and he proclaimed the amendment adopted as part of the Constitution. Subsequently an action was commenced challenging the legality of the West Virginia and Tennessee ratifications. In disposing of the challenge the Supreme Court held:

> As the Legislatures of Tennessee and West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. *Id.* at 137.

Under the rationale in *Lesser* Congress could propose a constitutional amendment to the effect that Indians can no longer vote, seek elected office or serve on juries. Thirty-six governors, without legislative approval, notify the Secretary of State that the amendment has been ratified, the Secretary of State proclaims it a part of the Constitution and the courts are powerless to look into the matter. If this is the law, concededly Petitioners lose on this issue.

But this cannot be the law. The Constitution is by its very nature substantive. The rights it guarantees every citizen are substantive, and a state's rights are substantive too. To bind the State of Washington by the unilateral act of the governor violates the State's sovereign rights as guaranteed by the Tenth Amendment, and as authorized by Congress in section 1323. It is for the Washington Legislature to make the decision as to retrocession, and to make the decision in the best interest of all the people as Congress intended. It is not for the governor and twenty-nine members of the Suquamish Indian Tribe to decide the interests of three thousand non-Indians.

B. Even If the Governor's Unilateral Retrocession Was Valid, Washington Did Not Surrender Jurisdiction Over Non-Indians.

It cannot be denied that the Court of Appeals, in *Oliphant*, failed to address this issue. It is equally clear that with passage of RCW 37.12.010 the State of Washington assumed jurisdiction over non-Indians in Indian country without consent of the tribes involved or gubernatorial proclamation, quoted *supra* at 116 and 117. This statute also excepted tribes, like the Suquamish, who had already come under State jurisdiction pursuant to the Laws of 1957, chapter 240, *supra* at 115 and 116.

Likewise it cannot be denied that the retrocession was qualified and accepted as such. In the exact language of the proclamation:

> IT IS FURTHER PROCLAIMED, that any jurisdiction exercised by the State of Washington over the Suquamish Port Madison Indian Reservation *except as provided* under Chapter 36, Laws of 1963 (RCW 37.12.010 - 37.12-060), is retroceded to the United States. (Emphasis added) (Appendix to brief page 64a).

And the Secretary accepted as follows:

> * * * retrocession to the United States of all jurisdiction exercised by the State of Washington over the Port Madison Indian Reservation, *except as provided* under Chapter 35(sic), Laws of 1963 (RCW 37.12.010 - 37.12.060), as offered on August 26, 1971, by proclamation of the Governor of Washington. (Emphasis added) (Appendix to brief page 65a).

Petitioners assert this retrocession and acceptance should be interpreted in one of the following ways, every one of which retains non-Indians within the jurisdiction of the State of Washington. First, since the jurisdiction retroceded was defined in terms of RCW 37.12.010, subsequently declared unconstitutional, the Secretary's acceptance was similarly

unconstitutional and the United States took back nothing. *See Confed. Bands & Tribes, Etc. v. State of Wash.*, 552 F.2d 1332 (9th Cir. 1977).

Second, the governor only retroceded jurisdiction over Indians on trust land not involved in any of the eight subject areas listed in RCW 37.12.010, and this is all the jurisdiction the Secretary accepted.

Finally, the retrocession proclamation provided that all jurisdiction over Port Madison was to be given back to the United States except as provided under RCW 37.12.010, and RCW 37.12.010 specifically provided that tribes already under Washington jurisdiction would remain totally under state control. The Suquamish fall within the proviso, therefore, all of Port Madison remains within the jurisdiction of the State of Washington.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the Ninth Circuit as to Mark David Oliphant, and the decision of the United States District Court for the Western District of Washington as to Daniel B. Belgarde, should be reversed, and writs of habeas corpus be issued declaring the Suquamish Indian Tribe and additional Respondents without jurisdiction over Petitioners in these matters.

If the Court of Appeals and District Court decisions are affirmed, Petitioners seek an additional ruling that the assumption of jurisdiction over them in these cases would be a denial of due process. In the event the Court declines to rule, or rules against Petitioners on this question, Petitioners wish to preserve any denials of due process for post conviction relief.

Respectfully submitted,

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APPENDIX TO BRIEF

UNITED STATES CONSTITUTION (1787)

(1) *Preamble:*

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

(2) (a) Article I, §1, *Legislative Powers Vested in Congress:*

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

(b) Article I, §8, *Powers of Congress*

Regulation of Commerce: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

(3) Article I, §9, Clause 2, *Privilege of Writ of Habeas Corpus Not To Be Suspended.*

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

(4) Article III, §2, Clause 3, *Trial by Jury to be Held in the State Where the Said Crimes Shall Have been Committed.*

Criminal Trial by Jury: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

(5) Article IV, §2, Clause 1, *Privileges and Immunities of Citizens in the Several States.*

Privileges and Immunities: The Citizens of each State shall be entitled to Privileges and Immunities of Citizens in the several States.

(6) Article IV, §4, *Guarantee to Every State a Republican Form of Government.*

Republican Government: The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

(7) Article VI, Clause 2, *Supremacy Clause*

Supreme Law of Land: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENTS

(8) AMENDMENT V, *Due Process of Law*

No person shall be deprived of life, liberty, or property without due process of law.

(9) AMENDMENT VI, *Jury Trial for crimes, and procedural rights* (Impartial jury of the State)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature, and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(10) AMENDMENT XIV, *Due process and equal protection of law guaranteed.*

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTIONAL PROVISIONS OF THE STATE OF WASHINGTON

(1) Article II, §1, *Legislative Powers, Where Vested.*

The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the State of Washington.

(2) Article III, §5, *General Duties of Governor.*

The governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.

(3) Article XXVI, Compact with the United States. #Second.

(. . . . within the boundaries of this state. . all lands . . . . owned or held by any Indian or Indian tribes . . . . shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .)

That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian

lands shall remain under the absolute jurisdiction and control of the congress of the United States.

CONSTITUTION AND BY LAWS OF SUQUAMISH INDIAN TRIBE (1916)

Preamble to Constitution

We, the lineal descendents of our noted chiefs, Kitsap and Sealth, together with the descendents of their associate counselors, and our tribe in general, in order to preserve our Council and promote justice and friendship, do hereby unite our good will for better conditions and understanding, to be bound and sealed in this Constitution.

Article I of By-Laws

The principal object of this Constitution and By-Laws is to assure the legal tribal rights of all members, who in good faith shall be subject to its fundamental spirit by their support.

CONSTITUTION AND BY LAWS OF SUQUAMISH INDIAN TRIBE APPROVED BY SECRETARY OF INTERIOR (1965)

Preamble to Constitution

We, the people of the Suquamish Indian Tribe of the Port Madison Reservation in the State of Washington, in order to establish our tribal organization, to develop our community resources, to administer justice, and to promote the economic and social welfare of ourselves and our descendants, do hereby establish this constitution and bylaws.

Article I - *Territory.*

The territory in which the Suquamish Tribe has a beneficial ownership interest includes that portion of the Port Madison Reservation remaining in an unallotted status at the time of the approval of this constitution and bylaws, and any other lands which may be acquired for or by, and held in the name of, the Suquamish Tribe. The jurisdiction of the tribe over such lands, and over the allotted lands within the original

boundaries of the Port Madison Reservation, shall not be inconsistent with applicable Federal and State laws. However, nothing in this Article shall be construed as restricting the treaty hunting and fishing rights of members, including the right to fish in usual and accustomed places.

Article II - *Membership,* Section I (Indian Blood)

The membership of the Suquamish Indian Tribe shall consist of the following:

(a) All persons of Suquamish Indian blood whose names appear on the official census roll of the tribe as of January 1, 1942; Provided, that such persons have not relinquished membership in the Suquamish Tribe or have not become enrolled as members of any other tribe, band or Indian Community; and Provided, further, that such roll may be corrected subject to the approval of the Secretary of the Interior.

(b) All children born between January 1, 1942, and the date of approval of this constitution and bylaws, to persons who are members; Provided that those children who have been enrolled as members of other tribes shall be eligible if within one year from the date of approval of this constitution, they or their parents acting in their behalf, apply for membership in the Suquamish Tribe and they relinquish membership in any other tribe.

(c) All persons of 1/8 or more Indian blood born to any member of the Suquamish Tribe, after the date of approval of this constitution and bylaws.

Article III - *Powers of the Governing Body*, Section 1, (h).

The governing body of the Suquamish Indian Tribe shall be known as the Suquamish Tribal Council. The Council shall have the following powers and duties subject to any limitations imposed by applicable State laws or statutes of the United States and the regulations of the Secretary of the Interior:

(h) To promulgate and enforce ordinances which shall be subject to approval by the Secretary of

the Interior governing the *conduct of members of the Suquamish Indian Tribe regarding hunting, fishing, and shell fishing.*

Article IV - *Manner of Review,* Section 1

Any resolution or ordinance which by the terms of this constitution is subject to review by the Secretary of the Interior, shall within 10 days of its enactment be presented to the Superintendent or Officer in Charge of the agency exercising jurisdiction, who shall within 10 days after its receipt, approve or disapprove it.

Article IX - *Referendum*

Upon receipt of a petition of at least 25 percent of the eligible voters of the tribe, or upon the request of the majority of the members of the tribal council, the Chairman shall call a general council meeting to be held within 30 days of receipt of such petition or request, to consider any enacted or proposed ordinance or resolution, and the vote of the majority of the qualified voters in such referendum will decide whether the enacted or proposed ordinance or resolution shall thereafter be in effect; Provided that 25 percent or more of the eligible voters shall vote in such referendum.

(Emphasis added)

TREATY OF POINT ELLIOTT, 12 STAT. 927 (1859)

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENT SHALL COME, GREETINGS:

Whereas a treaty was made and concluded at Muckl-te oh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen and

delegates of the Dwamish, Suquamash, Sk tahl-mish, Samahmish, Smalh kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, Skagit, Kik-i-allus, N'Quentl-ma-mish, Sk-tah-lejum, Stoluck-wha-mish, Sno-ho-mish, Swin a mish, Squin ah-mish, Sah ku-mehu, Noo-wha-he, Nook-wa-chah-mish, Mee see-qua-quich, Cho bah-ah-bish and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by law; which treaty is in the following words and figures to wit:

Articles of agreement and convention made and concluded at Muckl-te oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Dwamish, Suquamish, Sk-tahl-mish, Samahmish, Smalh-kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Me-see-qua-quich, Cho-bah-ah-bich, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the straits of Fuca, and crossing the same through the middle of Admiralty

inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's canal and Admiralty inlet to the portage known as Wilke's portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty inlet, and thence round the foot of Vashon's island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE II. *There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison,* called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's island called Shais-quihl, and the island called Chah-choo-sen, situated in the Summi river at the point of separation of the mouths emptying respectively into Gellingham bay and the gulf of Georgia; all which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; *nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent*, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE III. *There is also reserved from out of the lands hereby ceded the amount of thirty-six sections,* or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish river, including Tulalip bay and the before mentioned Kit-seh-do creek, for the purpose of establishing thereon and agricultural and industrial school, *as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade mountains in said Territory*; provided, however, that the President may establish the

central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE IV. *The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year* after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens.

ARTICLE VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VII. *The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place*

within said Territory as he may deem fit, or remunerating them for their improvements and the expenses of such removal, *or may consolidate them with other friendly tribes or* bands; and *he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege*, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the 6th article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. *The said tribes and bands acknowledge their dependence on the government of the United States*, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. *And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.*

ARTICLE X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is

guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE XII. *The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.*

ARTICLE XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars, to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

(Emphasis added)

(SIGNATURES AND RATIFICATION
OMITTED IN PRINTING)

UNITED STATES STATUTES

(1) 33 STAT. 1078 and 1079, FIFTY-EIGHTH CONGRESS, SESS. III, §1479 (1905), SECTION 6, ARTICLE I: ARTICLE II: ARTICLE III: ARTICLE IV

Sec. 6. That the following agreement made and concluded on the twenty-eighth day of May, nineteen hundred and four, by James McLaughlin, United States Indian inspector, *with the male adult Indians residing on the Port Madison Indian Reservation*, in the State of Washington, is hereby accepted, ratified, and confirmed.

This agreement made and entered into on the twenty-eighth day of May, nineteen hundred and four, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Indians belonging on the Port Madison Indian Reservation, in the State of Washington, witnesseth:

ARTICLE I. The said Indians belonging on the Port Madison Indian Reservation, in the State of Washington, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States all right, title, and interest which they may have in and to that portion of the unallotted lands of the said Port Madison Indian Reservation, in the State of Washington, described by legal subdivision of Government survey as lots four and five, in section twenty-one, township twenty-six north, range two east, Willamette meridian, containing forty-eight and seventy-five one-hundreths acres, more or less.

ARTICLE II. In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to pay to the said Indians per capita in cash the sum of three thousand nine hundred dollars, share and share alike, to each man, woman, and child belonging on the said Port Madison Indian Reservation, within ninety days after the ratification of this agreement, and also to pay to certain of said Indians, within the said time limit, the sum of three thousand six hundred and twenty-eight dollars for certain personal improvements, and four hundred and sixty-six and seventy-five one-hundredths dollars to the treasurer of the Port Madison Indian Improvement Club for floating wharf, and three hundred and fifty-five dollars to the treasurer of the board of trustees of the Port Madison Indian Church, as listed in schedule of appraisement of said improvements upon lands ceded by Article I of this agreement, a copy of which schedule of appraisement is hereunto attached. And it is further agreed that the disposition of the sum of eight hundred and eighty-four dollars, the appraisement of the Government schoolhouse and farmer's dwelling, and two hundred dollars for cable anchorages of two telegraph companies, as per attached schedule, is discretionary with the Secretary of the Interior, and may be expended, in his discretion, in the erection of a day school building *upon the remaining thirty-six acres unallotted subdivision of the Port Madison Indian Reservation*, described as lot three, section twenty-one, township twenty-six north, range two east, Willamette meridian, which unallotted subdivision adjoins lot four of the trace ceded by Article I of this agreement.

ARTICLE III. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Port Madison Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this agreement.

ARTICLE IV. This agreement shall take effect and be in force when signed by United States Indian Inspector James McLaughlin and *by a majority of the male adult Indians parties hereto*, and when accepted and ratified by the Congress of the United States.

In witness whereof the said James McLaughlin, United States Indian Inspector, on the part of the United States, and *the male adult Indians belonging on the Port Madison Indian Reservation*, in the States of Washington, have hereunto set their hands and seals at the Port Madison Subagency, Kitsap County, Washington, this twenty-eighth day of May, anno Domini nineteen hundred and four.

* * *

(Emphasis added)

(2) 25 USC §71 *Future Treaties with Indian Tribes*

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

(3) TRADE AND INTERCOURSE ACTS:

18 USC §1151 *Indian Country Defined*

Except as otherwise provided in section 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 USC §1152 *Laws Governing*

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by an Indian against the person or property of another Indian, nor to any Indians committing any offense in the Indian country who has been punished by the local laws of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.
(Emphasis added)

4 STAT. 729(1834) §*25 Indian Trade and Intercourse Act*

AND BE IT FURTHER ENACTED; that so much of the laws of the United States as provides for the punishment of crimes committed *within the sole and exclusive jurisdiction of the United States*, shall be in force in the Indian country: Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.
(Emphasis added)

(4) 18 USC §1153 *MAJOR CRIMES ACT*

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, *shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.*

* * *

(Emphasis supplied)

(5) 18 USC §13 *ASSIMILATIVE CRIMES ACT*

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(6) 48 STAT. 984(1934) *INDIAN REORGANIZATION ACT*

25 USC §476 *Organization of Indian Tribes*

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and *approved by the Secretary of the Interior*, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be *ratified and approved by the Secretary* in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council *by existing law*, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council *of all appropriation estimates or Federal projects for the benefit* of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.
(Emphasis added).

25 USC §477 *Incorporation of Indian Tribes*

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power

to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and *such further powers as may be incidental to the conduct of corporate business, not inconsistent with the law*, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.
(Emphasis supplied)

(7) 67 STAT. 588(1953) *PUBLIC LAW 83-280*

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to *the assumption of civil and criminal jurisdiction* in accordance with the provisions of this Act.
(Emphasis added)

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, *by affirmative legislative action, obligate and bind the State to assumption thereof.*
(Emphasis supplied)

(8) 82 STAT. 77(1968) *INDIAN CIVIL RIGHTS ACT:*

25 USC §1302 *Constitutional Rights*

No Indian tribe in exercising powers of self-government shall–

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable

search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any property for a public use without just compensation;

(6) deny *any person* in a criminal proceeding the right to a *speedy and public trial*, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and *at his own expense* to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishment, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury or not less than six persons.
(Emphasis supplied)

25 USC §1303 *Habeas Corpus*

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

25 USC §1323 *Retrocession of Jurisdiction*

The United States is authorized to accept a retrocession by any State *of all or any measure* of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of * * * the Act of August 15, 1953(67 STAT.

588)[Public Law 83-280], as it was in effect prior to its repeal by subsection (b) of this section.

Section 7 of the Act of August 15, 1953(67 STAT. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.
(Emphasis added)

WASHINGTON STATE STATUTES

(1) Laws of 1957, Chapter 240

An act providing for the assumption of criminal and civil jurisdiction over certain Indians and their reservations and lands as authorized by federal law [Public Law 83-280]; providing the time and method thereof, and the duty of the governor with respect thereto; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. The State of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country, and lands within this state in accordance with the consent of the United States * * *.

Section 2. Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the State of Washington to the extent authorized by federal law, *he shall issue* within sixty days *a proclamation to the effect* that such jurisdiction shall apply to all Indians and all Indian * * * country, * * *.

Section 3. Sixty days from the date of issuance of any proclamation of the governor * * *, *the State of Washington shall assume jurisdiction over offenses committed by or against Indians in the lands prescribed in the proclamation to the same extent that this state has jurisdiction over offenses committed elsewhere within this state and the criminal laws*

of this state shall have the same force and effect within such lands as they have elsewhere within this state.
(Emphasis added)

(2) Laws of 1963, Chapter 36, Amending Laws of 1957, Section 1, RCW 37.12.010.

(Chapter 240, 1957 Laws – Section 1)

Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953. (Public Law 280, 83rd Congress, lst Session),

(Amendment Laws 1963, Chapter 36 *added* following) but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public Assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) OPERATION OF MOTOR VEHICLES UPON THE PUBLIC STREETS, ALLEYS, ROADS AND HIGHWAYS: PROVIDED FURTHER, THAT INDIAN TRIBES THAT PETITIONED FOR, WERE GRANTED AND BECAME SUBJECT TO STATE JURISDICTION PURSUANT TO THIS CHAPTER ON OR BEFORE MARCH 13, 1963 SHALL REMAIN SUBJECT TO STATE CIVIL AND CRIMINAL JURISDICTION AS IF CHAPTER 36, LAWS of 1963 HAD NOT BEEN ENACTED.

(Emphasis added)

SUQUAMISH LAW AND ORDER CODE

PREAMBLE

We, the people of the Port Madison Reservation hereby establish this Code of Laws (1) to protect the lives and property of all persons within the boundaries of the Port Madison Reservation (2) to protect the natural resources and all other property of the Suquamish Tribe (3) to protect the life-ways of the Suquamish Indian people (4) to protect the rights of all persons within the boundaries of the Port Madison Reservation (5) to assure the peace and tranquility of the people within the Port Madison Reservation.

We do this as an act of self-determination that the people within the boundaries of the Port Madison Reservation have the right to protect and defend themselves and their property from illegal and unlawful acts of others where such protection is not offered by the laws of the State of Washington of the United States or by the officials thereof.

CHAPTER I
JUDICIAL CODE
ARTICLE I
JUDICIAL POWER

Section 1. *Power Vested.* The Judicial power of the people of the Port Madison Reservation shall be vested in the Suquamish Tribal Courts.

Section 2. *Scope.* The Judicial powers shall extend to all cases and controversies in law and equity arising under the laws of the Port Madison Reservation.

ARTICLE II
THE COURT OF APPEALS

Section 1. *Composition.* The Suquamish Tribal Court of Appeals shall consist of all of the judges of the Suquamish Tribal Court except the judge from whose decision the appeal is taken.

Section 2. *Jurisdiction.* The Court of Appeals shall have jurisdiction to hear and determine appeals from final judgments of the Trial Court of the Suquamish Tribe and all such appeals shall be tried as a new trial except for those issues of fact already determined by a jury. The Chief Judge shall have power to issue any order or writ necessary and proper to the complete exercise of the jurisdiction of the Court of Appeals.

ARTICLE III
THE TRIAL COURT

Section 1. *Composition.* The Trial Court of the Suquamish Tribal Court shall consist of one chief judge and one or more Associate Judges who shall be elected by the Suquamish General Council.

Section 2. *Scope.* In addition to duties and powers specifically enumerated under the Judicial Code, judges of the trial court shall have the same duties and powers as judges of the Juvenile Court of the Port Madison Reservation when so assigned.

Section 3. *Jurisdiction.* The Tribal Court of the Port Madison Reservation shall have original jurisdiction over:

(a) All crimes committed within the territorial jurisdiction of the Port Madison Reservation and all other Tribally owned lands, on any land allotted, Fee Patent lands, public lands, lakes, streams, waterways, highways and beaches,

except the major crimes as defined by the Act of March 3, 1885 (23 Stat. 362) as amended which are within the jurisdiction of the Federal Government.

(b) All civil actions in which the defendant is found within the Port Madison Reservation and is served with process within the territorial jurisdiction of the Tribal Court of the Suquamish Tribe.

(c) All actions involving domestic relations including, but not limited to divorce, adoptions, juvenile matters.

(d) All Indian probate matters, whether real or personal, including estates of minors, incompetents and decedents, except for restricted trust property contained therein.

All other matters which may hereafter be placed within the jurisdiction of the Tribal Court of the Suquamish Tribe by action of the Suquamish Tribal Council, State of Washington or Congress of the United States.

(f) The Tribal Court of the Suquamish Tribe shall have power to issue any order or writ necessary and proper to the complete exercise of its jurisdiction.

(g) The Tribal Court of the Suquamish Tribe shall have jurisdiction over all persons who enter the exterior boundaries of the Port Madison Reservation for whatever purposes; said act of entry being construed as consent to such jurisdiction. Notices to this effect are to be placed on all public and private roads leading into the Port Madison Reservation, and upon streams and lakes therein and at reasonable intervals along the beaches within the exterior boundaries of the reservation.

(h) The Jurisdiction of the Tribal Court of the Port Madison Reservation shall be concurrent and not exclusive with respect to an offense over which a Federal Court or State Court may have lawful jurisdiction; however, where the State or Federal authorities take no action for whatever reason against any person who is alleged to have committed such an offense, the Trial Court of the Port Madison

Reservation may assume jurisdiction over the alleged offender if the offense is in violation of the Suquamish Code.

The territorial jurisdiction of the Trial Court of the Port Madison Reservation shall embrace all land and property within the exterior original boundaries of the Port Madison Reservation.

ARTICLE IV
JUDGES

Section 1. *Qualifications.* Every judge shall be a Tribally recognized member of the Suquamish Tribe, shall be (35) thirty five years of age or over, of good moral character, and shall not have been convicted of a felony, or, convicted of a misdemeanor within the year immediately preceding his appointment, shall have completed high school or have a G.E.D. so as to be capable of understanding the provisions of this Code, court procedures and the duties of the office.

Section 2. *Term of Office.* Each judge shall hold office for an indefinite term but in no event less than six years.

Section 3. *Removal.* Any judge may be removed from office after due notice and a hearing by two-thirds vote of the Suquamish General Council, if there is reasonable cause to believe the judge to be guilty of malfeasance or misfeasance in office, neglect of duty, mental or physical incapacity to perform the duties of his office or the judge has been convicted of a felony in a State or Federal Court since entering office.

Section 4. *Salaries.* The salaries of the Chief Judge and Associate Judges shall be fixed and paid when funding is available.

Section 5. *Other Duties.* The Chief Judge, in addition to his judicial duties, shall have the authority to supervise the work of Associate Judges and court personnel.

Section 6. *Powers.* The Chief Judge and Associate Judges shall hear and determine all matters which are duly and regularly filed in the Tribal Court of the Port Madison Reservation. They shall have power to issue subpoenas to compel attendance of witnesses on their own motion or on the motion of a party litigant, and may punish for failure to comply with such subpoena of the Tribal Law and Order Code.

Section 7. *Rules of Court.* The Chief Judge and Associate Judges may adopt rules of pleading, practice and procedure applicable to any or all proceedings in the Trial Court and in the Court of Appeals. In addition, they may adopt uniform rules for the admission of evidence and may require the use of standard forms for pleadings, motions and other instruments filed in Court by litigants, as well as for judgments, writs, warrants and other court orders.

Section 8. *Seal.* The Court of the Port Madison Reservation shall adopt a seal which shall be used by the clerk of the court when he prepares certified copies of any official documents of the court, for use outside the court.

Section 9. *Disqualification.* No judge shall be qualified to act in any case where he or she has an interest, is or has been a material witness, is related to any party or their counsel by marriage or blood in the first or second degree. A Judge may be disqualified upon his own motion or by application by any party in the proceeding upon filing a verified motion in writing.

Section 10. *Assignments.* The Chief Judge shall hear all cases, criminal and civil, arising under this Code, except those which he has assigned to an Associate Judge.

ARTICLE V
CLERK

Section 1. *How Appointed.* The clerk of the Court shall be appointed by the Chief Judge.

Section 2. *Qualifications.* No person shall be appointed a Clerk of the Court unless the appointee:

(a) Is 21 years of age or older and of good moral character.

(b) Has never been convicted of a felony or has not been convicted of a misdemeanor within the past year.

(c) Speaks, writes and understands the English language fluently and has demonstrated competence in the skills essential to the preparation and maintenance of court records.

Section 3. *Duties.* The clerk shall render assistance to the law enforcement office and to residents of the Reservation in the drafting of complaints, subpoenas, warrants, and any other documents necessary to the functions of the court. The Clerk shall attend and keep a record of the Suquamish Tribal Court and Court of Appeals, read the complaints, administer oaths, collect all fines paid by or of the Court and account therefor. The clerk shall perform other duties as provided in this Code and as may be directed by the Chief Judge.

Section 4. *Bond.* The Clerk shall be bonded.

ARTICLE VI
RECORDS

Section 1. *Docket.* The Clerk shall keep a Docket in which shall be entered the names of each plaintiff and defendant in any civil or criminal proceeding, the character of the proceeding, the date of issuance and the return date of any process issued therein, the appearance or default of parties summoned, the date and amount of any judgment, any appeal thereon and all other proceedings there. The Clerk shall keep and maintain such other records as provided in this Code and as may be directed by the Chief Judge.

Section 2. *Copies of Proceedings.* Any party may obtain a certified copy of such proceedings from the clerk by payment of the cost thereof.

Section 3. *Copies of Laws, Ordinances, etc.* The Suquamish Tribal Court of the Port Madison Reservation shall be provided with copies of this Code and copies of other Federal and State laws and regulations and tribal ordinances deemed by the Court necessary, proper and applicable to the rights and conduct of persons subject to the jurisdiction of this Court and to its judicial powers and responsibilities.

CHAPTER III
CRIMINAL OFFENSES
ARTICLE I
OFFENSES

Section 1. *Abduction.* Any person who shall willfully take away or detain another person against his will or takes, detains or entices a child under eighteen from custody of its parent or other lawful custodian, when he lacks lawful permission to do so, shall be guilty of an offense of abduction and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than$500 or both, with costs.

Section 2. *Abuse of Office.* Any person acting or purporting to act for the Suquamish Tribe in an official capacity, taking advantage of such official or purported capacity, who knowing that his conduct is illegal, shall subject another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights or shall deny or impede another in the exercise or enjoyment of any right, privilege, power or immunity, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500 or both, with costs.

Section 3. *Adulteration of Food and Drink.* Any person who shall manufacture, sell or keep or offer for sale any food, drug or drink in the making of which any harmful substance is used shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250 or both, with costs.

Section 4. *Abandoned Iceboxes and other Containers.* Any person who shall have in his premises any abandoned chest, icebox or other container not in active use, any door to which has a latch or lock which automatically fastens upon the door being closed and which cannot be readily opened from the inside, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $100 or both, with costs, and shall be ordered to remedy the situation at his own expenses.

Section 5. *Assault.* Any person who shall attempt to threaten bodily harm to another person through use of unlawful force or violence or verbal threats shall be guilty of assault, and upon conviction thereof, shall be sentenced to confinement for not more than thirty (30) days or to pay a fine of not more than $60.00 or both, with costs. In the discretion of the Court, such offender may be required to furnish a satisfactory bond to keep the peace.

Section 6. *Assault and Battery.* Any person who shall willfully strike another person or otherwise inflict bodily injury on another person, or who shall cause another to harm himself, shall be guilty of assault and battery and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days, or to pay a fine of not more than $120.00 or both, with costs. In the discretion of the Court, such offenders shall be required to furnish a satisfactory bond to keep the peace.

Section 7. *Bigamy.* Any person who being married to another, marries any other human, shall be guilty of an

offense of bigamy; provided that no person shall be guilty thereof who believes that the prior spouse is dead or whose original spouse shall have been absent for seven successive years, without being known to be living, or if the original marriage has been dissolved, pronounced void and annulled by the decree of a court of competent jurisdiction. Upon conviction thereof, such person shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $100 or both, with costs.

Section 8. *Breaking and Entering.* Any person who breaks into or attempts to break into any building or dwelling of any nature or other property with intent to commit any crime shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to imprisonment at labor for a period of not to exceed six (6) months or to pay a fine of not to exceed $500 or both, with costs, and may be required to make proper restitution by order of the Court.

Section 9. *Bribery.* Any person who shall give or offer to give any money, property, services or other gain or advantage to another human with corrupt intent to influence another in the discharge of his public duties or conduct and any person who shall accept, solicit or attempt to solicit any bribe as above defined, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500 or both, with costs.

Section 10. *Causing or Aiding Suicide.* Any person who shall purposely aid another to commit suicide shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 11. *Child Abuse.* Any person who shall willfully and maliciously commit acts of violence or abuse of any child under the age of eighteen (18) shall be guilty of an offense and upon conviction thereof shall be sentenced to confine-

ment for a period of not more than six (6) months and to pay a fine of not more than $500, or both, with costs.

Section 12. *Child Molestation.* Any person who shall entice, persuade, or attempt to persuade a child under the age of eighteen (18) years to enter any indecent act or any person having possession of a child under the age of eighteen (18) years in any vehicle, building, room, boat or secluded place with intent to commit an indecent act shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 13. *Communicable Diseases.* It shall be unlawful for any person infected with a communicable disease including but not limited to syphillis, gonorrhea, tuberculosis or other communicable disease dangerous to the public health, knowingly to expose another person to infection. The Court may order and compel the medical examination and treatment of any person afflicted with any such disease. Any person adjudged to be afflicted with any communicable disease of the nature specified in this section, who knowingly continues to expose others to infection, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for not more than six (6) months, or to pay a fine of not more than $500, or both, with costs.

Section 14. *Contributing to the Delinquency of a Child.* Any person who shall willfully, by an action or admission, willfully encourage or contributes to the delinquency of any child (under eighteen (18) years of age) as specified in the Juvenile Code shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than four (4) months or to pay a fine of not more than $360, or both, with costs.

Section 15. *Criminal Trespass – Buildings.* Any person who shall enter or secretly remain in any building or separately secured or occupied portion thereof, knowing that

he is not licensed or privileged to do so, whether by day or night, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than four (4) months or to pay a fine of not more than $400, or both, with costs.

Section 16. *Criminal Trespass – Lands.* Any person who shall enter or remain upon any lands including beaches or waters as to which notice against trespass is given by actual communication to such person, or by posting in a manner reasonably likely to come to the attention of intruders, or by fencing or other enclosure manifestly designed to exclude intruders, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than one (1) month or to pay a fine of not more than $100, or both, with costs, and shall be required to pay any damages ensuing from such criminal trespass.

Section 17. *Cruelty to Animals.* Any person who shall torture, mistreat, mutilate, override, or overload or deprive of food or drink, or abandon any animal which he owns of which is in his custody, or cause or procure the same, shall be guilty of an offense shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $100, or both, with costs.

Section 18. *Curfew.* Any minor who shall without parental consent be or any person who shall without good cause permit his minor children or any minor children under his care to be on the streets, highways or other public places on the Port Madison Reservation between the hours of 11:00 p.m. to 6:00 a.m. shall be guilty of an offense and upon conviction thereof, shall be sentenced to imprisonment for a period of not to exceed sixty (60) days or to pay a fine not to exceed $100, or both, with costs.

Any minor who shall violate this section shall be referred to the Juvenile Code.

Section 19. *Cutting Fence.* Any person who shall willfully cut the wire of a fence belong to another person or

the Suquamish Tribe shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $120, or both, with costs, including restitution for any property damaged.

Section 20. *Cutting Timber without a Permit.* Any person who without first securing a permit from the Suquamish Tribal Council cuts any standing green timber, including Christmas trees, on tribal land shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250, or both, with costs.

Section 21. *Desertion and Nonsupport of Children.* Any person who shall desert or willfully neglect or refuse to provide for the support or maintenance of a child of such person, including an illegitimate child or child in the lawful custody of such person, when the person is financially able to provide therefore, shall be sentenced to confinement for a period of six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 22. *Defacing Official Signs.* Any person who shall, without proper authorization, pull down or deface any sign of the Tribe, State, or Federal Government, or any advertisement authorized by law shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than fifteen (15) days or to pay a fine of not more than twenty-five ($25.00) or both, with costs, any may be required to make restitution for the damages done.

Section 23. *Destruction of Evidence.* Any person who shall willfully and knowingly destroy or withhold any evidence that could be used in the trial of a case with intent to prevent same from being used, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not to exceed sixty (60) days or to a

fine of not language to any person present or create a hazardous or physically offensive condition shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for not more than sixty (60) days or to pay a fine of not more than $150, or both, with costs.

Section 28. *Drawing or Uttering Instrument on Bank without Funds or Credit.* Any person who shall for a present consideration make or utter or deliver any check, draft, or order for payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft or order in full upon its presentation shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days and to pay a fine of not more than $100, or both, with costs, and may be required by order of the Court to make proper restitution.

Section 29. *Embezzlement.* Any person who shall, having lawful custody of property not his own, appropriate the same to his own use with intent to deprive the owner thereof, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, and to make such restitution as may be required by order of the Court. As used in this section, embezzlement shall also include the spending of minor's funds by parents or guardians for other than the purpose for which the funds were placed in the custody of the parents or guardians.

Section 30. *Escape.* Any person, who being in the lawful custody of a law enforcement officer, shall unlawfully remove himself from official detention by escape or attempt to escape, or who shall permit or assist or attempt to permit or assist another person to escape from lawful custody, or who shall fail to return to official detention following leave

granted for a specific purpose or a limited time (excluding probation, parole, or release on bail) shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 31. *Extortion.* Any person who shall willfully, by making false charges against another person or by any other means whatsoever, extort or attempt to extort any money, goods, property or anything else of value shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than (6) six months or to pay a fine of not more than $500, or both, with costs.

Section 32. *Failure to Send Children to School.* Any person who shall, without good cause, neglect or refuse to send his children or any children under his care to school, who have not reached their sixteenth (16) birthday or have not completed their eighth (8th) grade, whichever is first, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days, or to pay a fine of not more than $120, or both, with costs.

Section 33. *False Alarms.* Any person who knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, for dealing with emergencies involving danger to life and property shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $100, or both, with costs.

Section 34. *False Arrest.* Any person who shall willfully and knowingly make, or cause to be made, the unlawful arrest, detention or imprisonment of another person shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three

(3) months or to pay a fine of not more than $300, or both, with costs.

Section 35. *Failure to Support Dependent Persons.* Any person who shall, without lawful excuse, refuse or neglect to furnish food, shelter or care to those dependent upon him, under the laws, customs and usages of the Suquamish Tribe, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months, or to pay a fine of not to exceed $180, or both, with costs.

Section 36. *Fire, Failure to Control or Report.* Any person who knows that a fire is endangering life or property and fails to give a prompt fire alarm or fails to take reasonable measure to put out or control the fire without danger to himself if he knows that he is under official, contractual or other legal duty to prevent or combat the fire; or if the fire was started, lawfully or unlawfully by him or with his assent, or on property in his custody or control, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 37. *Firing Timber.* Any person who shall willfully set on fire any timber, woods, meadow, marsh, field or prairie shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 38. *Fish and Game Violation.* Any person who shall fail to comply with Fish and Game regulations adopted and promulgated by the Suquamish Tribe pursuant to the provisions of this Code or any other act, ordinance or resolutions of the Suquamish Tribe now or hereafter in force on the Port Madison Reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to

confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, and all fish or game including equipment such as fishing equipment, guns, boats, etc., used to obtain such fish and game illegally may be confiscated by the Court.

Section 39. *Flags – Desecration Thereof.* Any person who in any manner for exhibition or display shall place or cause to be placed any mark, word, or design upon, or shall publicly mutilate, defase or defile an official flag, color or ensign of the United States, the State of Washington, the Suquamish Tribe, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than ten (10) days or to pay a fine of not more than $25, or both, with costs.

Section 40. *Forgery and Counterfeiting.* Any person who shall, with intent to defraude, falsely sign, execute, alter or counterfeit any written instrument and currency shall be guilty of forgery and upon conviction thereof shall be sentenced to confinement at labor for a period of six (6) months or to pay a fine of not more than $500, or both, with costs, and may be required by order of the Court to make proper restitution.

Section 41. *Fraud.* Any person who shall by willfully misrepresentation or deceit, or by false interpreting, or by the use of false weights or measures, obtain any money or other property shall be guilty of fraud and upon conviction thereof shall be sentenced to confinement for a period of not more than two (2) months or to pay a fine of not more than $150, or both, with costs, and may be required by order of the Court to make proper restitution.

Section 42. *Gambling.* Any person who participates in any game of chance or lottery to win money or other valuable consideration or operates a place or device where a risk is taken on a chance of winning money or other valuable property without a Suquamish Tribal permit and license shall

be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than fifteen (15) days or to pay a fine of not more than $50, or both, with costs. This section shall not apply to those games or chance or lottery authorized by the Suquamish Tribal Council.

Section 43. *Indecent Exposure.* Any person who publicly exposes his sexual organ under circumstances in which his conduct is likely to cause affront or alarm, shall be guilty of an offense, and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $50, or both, with costs.

Section 44. *Injury to Public Property.* Any person who by any means whatever shall willfully or mischievously injure, destroy or deface any building or other property of the Suquamish Tribe or of the United States Government, or any other public property or deface or write upon any walls or shall insure the grounds appurtenant thereto, or the trees, fences, soil or pavement thereof shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $100, or both, with costs, and may be required by order of the Court to pay for such injury, destruction or damage.

Section 45. *Liquor Violations.* Any person who shall within the exterior boundaries of the Port Madison Reservation sell, barter, transport or manufacture any alcoholic beverage, unless possessing a legal license or permit from the Suquamish Tribal Council to do so, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 46. *Littering.* Any person who shall dispose any garbage or other forms of litter or waste anywhere within the exterior boundaries of the Port Madison Reservation,

including waterways, tidelands, public roads, except in public waste disposal grounds designated by the Suquamish Tribal Council, shall be guilty of an offense and upon conviction thereof, shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $500, or both, with costs.

Section 47. *Maintaining a Public Nuisance.* Any person who shall act in such a manner, or permit his property to fall into such condition as to injure or endanger the safety, health, comfort or property of his neighbors, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $200, or both, with costs, and may be required to remove or correct such nuisance when so ordered by the Court.

Section 48. *Malicious Mischief.* Any person who shall maliciously disturb, defase, injure or destroy any tangible property not belonging to him shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than two (2) months, or to pay a fine of not more than $100, or both, with costs, and may be required by order of the Court to make proper restitution.

Section 49. *Marijuana.* Any person who shall plant, grow, cultivate, keep for sale, sell, barter, give, have possession of or use marijuana, or any mixture or compound thereof, or any drug or derivative thereof determined by the Court harmful to the physical and mental health of the user, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 50. *Misbranding.* Any person who shall knowingly and willfully misbrand, alter or deface any brand or mark intended to designate ownership of any livestock or other property, including boats, of another person without his

consent and with the intent to deprive the owner of his property, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days and to pay a fine of not more than $200, or both, with costs.

Section 51. *Neglecting Dogs and other Animals.* Any person who shall allow a dog or other animal owned by such person or in his lawful custody roam at large or wander through populated areas, shall be guilty of an offense and upon conviction thereof shall be sentenced for a period of not more than five (5) days or to pay a fine of not more than $25, or both, with costs, provided that such dogs or animals not claimed by anyone may be disposed of by order of the Court.

Section 52. *Obstructing Justice.* Any person who with the purpose hindering the apprehension, prosecution, conviction or punishment or another for a crime, shall harbor or conceal another person, provide a weapon, transportation or other means of escape, warns the other of impending discovery, or volunteer false information to a Law Enforcement Officer, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250, or both, with costs.

Section 53. *Operating Business Without Permit.* Any person who shall engage in any business of whatever nature for profit on the Port Madison Reservation without first obtaining a business license from the Suquamish Tribal Council, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $500, or both, with costs.

Section 54. *Perjury.* Any person who shall willfully and deliberately in any judicial proceeding in any court of the Suquamish Tribe, falsely swear or interpret, or shall make a

sworn statement or affidavit knowing the same to be untrue, or shall induce to procure another person to do so, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than four (4) months or to pay a fine of not more than $300, or both, with costs.

Section 55. *Public Drunkenness; Drug Incapacitation.* Any person who shall appear in any public place under the influence of alcohol, or any other drug or narcotic, to the degree that he may endanger himself or another human or property, or annoy any persons in his vicinity, shall be sentenced to confinement for a period of not more than thirty (30) days or pay a fine of not more than $50, or both, with costs. The Court may in its judgment order the person upon conviction to participate in any available alcoholic or drug abuse program in lieu of the foregoing penalties which may be imposed upon failure of the person to follow the orders of the Court. Drunkenness alone in the absence of the other elements of this section shall not be an offense.

Section 56. *Prostitution.* Any person who shall engage in sexual activity as a business or who shall knowingly keep, maintain, rent or lease any house, room or tent or other place for the purpose of so engaging, and any person who shall procure any person to engage in such activities, or live off the earnings of any person engaged in such activities, shall be guilty of an offense and upon conviction thereof shall be sentenced for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 57. *Rape.* Any person who willfully and knowingly by force and violence rape, attempt to rape another or assists in a rape or attempted rape, or has sexual intercourse with a person under eighteen (18) years of age or a person suffering from mental defect or anyone not able to understand or control his conduct for whatever reason, shall be guilty of an offense and upon conviction thereof shall be

sentenced to confinement for a period of not to exceed six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 58. *Receiving Stolen Property.* Any person who shall receive or conceal or aid in receiving or concealing any property, knowing the same to be stolen, embezzled, or obtained by fraud or false pretense, theft, burglary or robbery, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, and may be ordered by the Court to make proper restitution.

Section 59. *Recklessly Endangering Another Person.* Any person who recklessly engages in conduct which places or may place another person being in danger of death or serious bodily injury shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of $500, or both, with costs, and may be required to furnish a satisfactory peace bond for one year.

Section 60. *Registration of Dogs.* Any person who shall fail to register and pay a registration fee of $1.00 for each calendar year for any dog owned by him or in his possession shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement at labor for a period of not more than ten (10) days or to pay a fine of $25, or both, with costs. No dog will be registered unless there is produced a valid certificate of vaccination and, upon registration, all dogs shall be required to wear a registration tag. Dogs may be registered at the Tribal offices of the Suquamish Tribe or at any other station designated by the Suquamish Tribal Council. Any dog not so registered or wearing a tag attached to a collar found running at large may be picked up by the Law Enforcement Officer and disposition made thereof pursuant to order of the Court.

Section 61. *Removal of Landmarks, Navigation Markers, etc.* Any person who shall willfully remove, alter or destroy any boundary marker navigation marker or other water or landmark erected by the Suquamish Tribe of the United States Government within the limits of the Port Madison Reservation shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $50, or both, with costs.

Section 62. *Resisting Lawful Arrest.* Any person who shall willfully and knowingly, by force or violence, resist or assist another person to resist a lawful arrest shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $120, or both, with costs.

Section 63. *Refusing to Aid an Officer.* Any person who shall neglect or refuse, when called upon by any Law Enforcement Official, to assist in the arrest of any person charged or convicted of any offense or in securing such offender when apprehended, or in conveying such offender to the nearest place of confinement shall be guilty of an offense, and upon conviction shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $60, or both, with costs, provided that no responsibility shall attach to the person assisting the Law Enforcement Official at his request.

Section 64. *Theft.* Any person who shall take, or exercise unlawfully control over, the moveable property not his own or under his control with the purpose to deprive the owner thereof, or who lawfully transfers immovable property not his own or any interest therein with the purpose to benefit himself or another not entitled thereto shall be guilty of offense and shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250, or both, with costs, if the value of such

property is less than $50 and shall be sentenced to confinement at labor for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, if the value of the property is $50 or over. The Court may order proper restitution to be made in each case.

Section 65. *Threat or Intimidation.* Any person who, directly or indirectly, utters or addresses any threat of unlawful harm to any person with the purpose to influence his decision, opinion recommendation, vote or other exercise of discretion as a public servant or voter or to influence a public official to violate any public duty, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250, or both with costs.

Section 66. *Threat or Intimidation to Law Enforcement Official or Judge.* Any person who shall use unjustified force or violence, or threaten the use thereof, to a Law Enforcement Official or to a Judge of the Suquamish Tribal Court, for the purpose of interfering with or influencing the performance of an official duty, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 67. *Unauthorized Use of Property, including Vehicles.* Any person who shall, without property authority, use or injure any property not belonging to him, or who shall operate another's automobile, motorcycle, motor boat, or other motor-propelled vehicle without the consent of the owner shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement at labor for a period of not more than three (3) months and to pay a fine of not more than $250, or both, with costs.

Section 68. *Unlawful Assembly or Riot.* If two or more persons assemble for any unlawful purpose affecting the peace of the Port Madison Reservation or for the purpose of

committing acts of violence including destruction of property against the peace and tranquility of the Port Madison Reservation or conspire to do so, or who refuse to obey an order of a Law Enforcement Officer, each person shall be guilty of an offense and upon conviction thereof, shall be sentenced to confinement at labor for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, and may be ordered to make proper restitution for any damages as the Court may direct. This section does not apply to any person or persons who have an approved permit to express their right of dissent and to petition for redress of grievances in a peaceful, orderly and legal manner.

Section 69. *Weapon, Carrying.* Any person who shall go about in public places armed with a dangerous weapon concealed upon his person, unless he shall have a permit signed by a Judge of the Suquamish Tribal Court or a license issued by the Suquamish Tribe, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $150, or both, with costs, and such weapon shall be confiscated and disposed of in such manner as the Court may order.

Section 70. *Weapons, Firing.* Any person who fires a gun within any settled community on the Port Madison Reservation (or in any other place within the boundaries of the Port Madison Reservation with careless disregard for human life or property) shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for not more than thirty (30) days or to pay a fine of not more than $50, or both, with costs.

Section 71. *Distribution of Alcohol to the Mentally Retarded.* Any person who shall sell, barter or give any alcoholic beverage to any mentally retarded person, (or person with a mental defect or anyone not able to understand or

control his/her conduct for whatever reason) irregardless of age, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

ARTICLE II
SENTENCING

Section 1. *Discretion of Court.* Any confinement order of the Judge may include:

(a) Serving of sentence on weekends.

(b) Labor for public purposes while confined or in lieu thereof.

(c) Confiscation of any material substance or equipment used in wrongful and illegal acts.

ARTICLE III
POST TRIAL PROCEDURE

Section 1. *Directed Verdict.* At any time after the close of the evidence, the Court may direct a verdict of acquittal. After the charge, the jury shall retire to determine a verdict. The jury must render a verdict on every allegation in the complaint. After the verdict of the jury has been announced to the Judge, he shall discharge the jury.

Section 2. *Acquittal.* If the Court finds for the defendant or the jury brings in a verdict of not guilty on all counts of the complaint, a judgment of acquittal shall be announced by the Court and entered in the official records by the Clerk, along with the names of the jurors in the case, and the defendant shall be immediately discharged.

Section 3. *Conviction and Sentencing.* Within a reasonable time after a verdict or plea of guilty and after such

pre-sentencing investigation as the Judge may direct, the Judge shall sentence the defendant in conformity with the applicable provisions of this Code, and deliver to the Law Enforcement Officer a signed copy of the sentence. The judgment of conviction shall state the charge, the plea, the verdict and the sentence. The judgment shall be signed by the Judge and entered in the official records by the Clerk. The Judgment shall direct that the prisoner be held in custody until the prisoner has satisfied the sentence according to law.

Section 4. *Payment of Fine.* When the defendant is sentenced to pay a fine, the Court may permit payment within a definite period or by installment. In the absence of such permission, a fine shall be payable forthwith. Fines and any installment thereof shall be payable to the Clerk.

Section 5. *Motion for New Trial.* A motion for a new trial to be held in the Trial Court may be made by the defendant within seven days after judgment. The Court shall grant a motion for a new trial for the causes set forth in the Rules of the Court if such trial is required in the interest of justice.

Section 6. *Right of Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the Court shall advise the defendant of his right to appeal. All appeals shall be made in accordance with this Code.

Section 7. *Probation.* After conviction of an offense, the Court may upon such reasonable terms and conditions as it considers necessary, suspend any sentence and release the prisoner on probation. In granting probation, the Judge shall consider the prior criminal record of the prisoner, his background, character, financial conditions, family obligations and other reasonable and relevant circumstances, and other conditions as specified in the Rules of the Court.

Section 8. *Violation of Probation.* If any person shall violate his probation, he may be required to serve his original sentence plus an additional penalty for violation of his

probation, but the Court shall not revoke probation except after a hearing at which the defendant shall be present and advised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

SUQUAMISH TRIBAL COMMUNITY ORDINANCE

In order to establish land use controls for the Suquamish Indian Tribe located on the Port Madison Indian Reservation, the General Council does hereby enact the following ordinance:

Section 1. *Title and Duration*

This ordinance shall be known as the "Interim Land Development Ordinance of the Suquamish Indian Tribe for the Port Madison Indian Reservation". It shall remain in force and effect until the adoption of a master plan and comprehensive zoning ordinance, but in no event longer than eighteen (18) months.

Section 2. *Findings of Fact and Purpose*

a. *Background*: The Suquamish Tribe is located within Kitsap County. With the development of the Trident Submarine Base considerable pressure has been placed on land development within the Reservation and throughout the County. Unprecedented and rapid growth of population, housing, economic, and land development and increased utilization of natural resources has occurred during the recent past, and is expected to accelerate in the future. Faced with a number of major physical, social and fiscal problems, caused by this rapid growth in the area of the Port Madison Reservation including pressure to utilize land within the Reservation to meet those burdens caused by increased development outside of the Reservation and having concern with overall quality, density and character of land development within the Reservation, the *Suquamish Tribe has undertaken a comprehensive program to prepare a master plan to guide its future land* and *resource* development.

The Comprehensive planning program is *being accomplished by the Tribal Planner* and the *Tribal Planning*

Commission to be established *by the Suquamish Tribal Council* with the *aid of federal and Tribal funds* to review, modify, and finally present to the community and the General Council a Master Plan. The planning program will include a study and analysis of the Reservation's population, housing conditions, existing land use and proposed economic development. Technical data regarding soil, climate, water resources and drainage basins as well as other technical information will be gathered.

b. *Legislative Findings of Fact:* The Suquamish General Council hereby finds that, pending the final development and implementation of a master plan and comprehensive zoning ordinance to be in effect for a reasonable period. The Council further finds that a procedure should be established whereby variance may be made to protect against undue hardship which may be occasioned in individual cases by this ordinance.

c. *Legislative Purpose:* The purpose of this ordinance is to protect the planning process during the development of a master plan and comprehensive zoning ordinance for the Port Madison Reservation, and to insure that the existing character and use of land within the Port Madison Reservation are not altered materially pending the development of a master plan and comprehensive zoning ordinance. *Such reasonable legislation is in the best interest of the Suquamish Tribe* in that it will prevent the establishment of a pattern of land use and development which might be inconsistent with the developed master plan.

It is the *goal of the Suquamish General Council* in enacting this ordinance to *maintain the Port Madison Reservation as a social, cultural, political and economic unit for the continuing benefit and prosperity of the members of the Suquamish Indian Tribe*, while at the same time insuring that the property interests of any person not a member of the Suquamish Indian Tribe be protected, and non-member property owners are given an opportunity to participate in the development of a master plan and comprehensive zoning ordinance for the Port Madison Reservation.

Section 3. *Jurisdiction*

a. *Basis of Jurisdiction: Notwithstanding the issuance of any patent,* the *jurisdiction and governmental power of the Suquamish Indian Tribe* shall *extend to the territory within the confines of the Port Madison Reservation* as established by the Point Elliott Treaty Stat. (1885) and by executive order dated , *and to all persons* acting within the boundaries of the Reservation.

> By the Treaty of Point Elliott and United States covenanted the following:
>
> "nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent (of Indian affairs) or (Indian) agent."
>
> The Attorney General of the United States, 23 Op. Att'y Gen. 214, 217-18 (1900) has ruled that:
>
> "The legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the law of such nation. . . these nations (are fully authorized) to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose. . ."
>
> The Solicitor of the United States Department of the Interior, 55 I.D. 14, 50 (1934) has ruled that:
>
> "over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business. . ."

which principle is supported by the Supreme Court of the United States, *Morris v. Hitchcock*, 194 US 384 (1904), and by other courts.

Suquamish Indian Tribe has the sovereign power to regulate the use of lands within the exterior boundaries of the Reservation in a proper zoning and planning scheme.

b. *Persons and Property Covered by this Ordinance: This ordinance shall apply to all property located within the exterior boundaries of the Port Madison Reservation notwith-*

standing the issuance of any allotment, patent and *notwithstanding the trust status of the land involved.* This ordinance shall further *apply to all persons* who have any interest whatsoever in any real property or any appurtenance to said real property within the boundaries of the Port Madison Reservation, whether said interest is in fee or otherwise.

c. *Persons or Property Not Affected:* The provisions of this ordinance shall not apply to the development of any community facility as defined herein.

Section 4. *Definitions*

a. *Accessory Building or Use:* A building, part of a building or structure or use which is subordinate to, and the use of which is incidental to, that of the main building, structure or use of the same parcel of land.

b. *Agriculture:* The tilling of the soil, the raising of crops, horticulture, livestock farming, dairying, animal husbandry, and the use of barns, sheds and corrals in connection therewith.

c. *Business:* The sale, trade, barter or other conveyance of property, goods or services, or other activity carried on for the purpose of providing profit, gain, advantage or other benefit to the person so engaged.

d. *Commercial Development:* The clearing, grading or drilling of land and the construction, erection, placement or remodeling of any structure, addition, appurtenance or other building for the purpose of engaging in business or industry.

e. *Community Facilities: Any building, structure or parcel of land which is operated in whole or in part by the Suquamish Tribe* for the use, benefit, or economic or social development *of the Suquamish Tribe.*

f. *Dwelling:* A building or portion thereof designed exclusively for residential purposes, but not including hotels, motels, boarding houses or lodging houses.

g. *Dwelling, Multiple Family:* A detached building designed for occupancy by more than one family or by more than one unmarried individual.

h. *Dwelling, Single Family:* A detached building designed exclusively for occupancy by one family.

i. *Home Occupation:* Any occupation carried on within the dwelling or accessory building, which is clearly secondary to the main use of the premises as a dwelling. This occupation shall be carried on or conducted only by members of a family residing in the dwelling and in connection with which there is kept no stock in trade or commodity for sale upon the premises.

j. *Industry:* The construction, mining, smelting, fabricating, refining, milling or other alteration of raw materials for the purpose of selling, trading, bartering or otherwise conveying the resultant product for gain, profit or other advantage.

k. *Logging:* The cutting of stumpage, cutting into boards or otherwise removing and altering of live trees for the purpose of sale, trade, profit or other business advantage.

1. *Mobile Home:* A structure designed for human habitation which is at least 32 feet in length and 8 feet in width and which by original design is capable of being moved on public streets and highways.

m. *Mobile Home Park:* A parcel of land which has been planned and improved for the placement of mobile homes for dwelling or sleeping purposes.

n. *Recreational Use:* Camping, hiking, picnicing.

o. *Subdivision:*

a. The dividing up of any lot, parcel, tract, or section, or part thereof, of land by contract, mortgage, sale, trade, lease or other device where:

   1. The division creates 3 or more parcels or building sites of any size up to 20 acres, or

   2. 3 or more parcels or building sites of up to 20 acres are created by successive division within 18 months of the date of passage of this ordinance.

b. The division of property as set forth below shall not constitute a subdivision except that subsequent use of the property so divided shall be required to be in conformity with the provisions of this ordinance:

1. The sale of lots, parcels, tracts, or sections of land which are 20 acres or larger, or
2. The division or assigning of portions of lots, parcels, tracts, or sections of land, shown as contiguous units on the county tax rolls or Bureau of Indian Affairs records as of the date of passage of this ordinance, to any or all of the various owners or record as of the date of passage of this ordinance.

Section 5. *Prohibited Acts*

a. Unless allowed pursuant to section 7 of this ordinance, *it shall be unlawful for any person to build or cause to be built any structure of whatever* character or place or *cause to be placed any mobile home upon any land within the boundaries of the Port Madison Reservation,* or to *modify or cause to be modified any existing structure or mobile home* located upon lands within the boundaries of the Port Madision Reservation, or to divide, subdivide, plat or otherwise attempt to modify or otherwise change any existing parcel of land located within the boundaries of the Port Madision Reservation for the purpose of sale or building thereon, or engage in development, construction or modification of any existing mobile home park, *or engage in any industry not now presently in operation*, nor shall any person engage in any logging operation, land clearing, or other activity modifying or affecting the topography of any land located within the Port Madison Reservation.

b. To avoid undue hardship, nothing in this ordinance shall be deemed to require a change in plans, construction or designated use of any building on which actual construction has lawfully begun prior to the emergency enactment of this ordinance, and upon which the actual building construction has been diligently carried on. Actual building construction is hereby defined to mean the placing of construction materials to permanent position and fastened in a permanent manner.

c. Any land within the boundaries of the Port Madison Reservation may continue to be used for any purpose that the land is presently committed to, including the use and occupancy of any structure, thereon, *provided*, nothing in this

subsection shall authorize any of the acts prohibited in section 5a above without first complying with section 7 below.

d. Nothing in this ordinance is designed to create or determine the use of any structure or property which may be considered non-conforming under the Master Plan and Comprehensive Zoning Ordinance.

Section 7. *Variance*

The Suquamish General Council shall have the power to *vary the application of any provision of this ordinance upon its determination*, in its legislative discretion, that, the granting of such variance is consistent with the spirit of the development master plan for the Port Madision Reservation and with the health, safety, morals and general welfare of the community.

a. Applications for variance

1. *Applications for a variance shall be submitted to the Tribal Council* and shall include the following information concerning the property for which the application is being made:

(a) Type of use proposed
(b) A description and detailed plan of any anticipated construction on said property or currently owned adjacent property
(c) Topographical contours
(d) Access right of way
(e) Utility lines and easements
(f) Solid waste disposal methods
(g) Sewage disposal methods
(h) Analysis of traffic patterns
(i) Landscape plan
(j) Phasing or timing of the project
(k) List of restrictive covenants (if any) concerning quality of private structure and landscape to be erected

(l) Water supply provisions

(m) Fire and police protection

(n) Road standards to be used for drives and roads

(o) List of deviations from normal requirements of the ordinance

(p) Legal description of property

(q) Name and address of legal owner

(r) Name and address of person submitting application

(s) Any other relevant data requested by the Tribal Council or the Planning Committee

2. *The Suquamish Tribal Council shall refer such application to a Hearing Officer appointed by the Suquamish Tribe* for the development of an initial recommendation to the Tribal Council to either grant or deny the variance. An application for variance shall be forwarded to the Hearing Officer within forty-eight (48) hours of its receipt in the office of the Tribal Council.

b. Procedures before Hearing Officer

1. Upon referral of an application for a variance from the Tribal Council to the Hearing Officer, the Hearing Officer shall cause notice of the pending application to be published in a newspaper of general circulation within the Port Madision Reservation and shall further cause notice to be posted at locations within the Port Madision Reservation. If the Hearing Officer has determined to hold a hearing on the application for a variance the notice provided in this section shall detail the time and location of said hearing.

2. The Hearing Officer may hold hearings, call witnesses or request the submission of any other material considered relevant to a determination of an application for a variance. The Hearing Officer shall hold a hearing when requested by an applicant or other interested person. Notice of all scheduled hearings shall be posted at locations within the Port Madision Reservation at least ten (10) days prior to any scheduled hearing. The Hearing Officer shall determine the rules of procedure to be followed at hearings provided by this section.

3. The Hearing Officer shall prepare a report and deliver it to the General Council within sixty (60) days of receiving the application for variance. The report shall detail the material considered by the Hearing Officer, whether a hearing was held, and shall note the basis of any recommendation contained therein.

c. Procedures Before General Council

1. *The General Council* shall either *grant or deny* the variance within thirty (30) days of receipt of the report of the Hearing Officer. The General Council shall consider a pending application based upon the record and finding made before the Hearing Officer. The *General Council may*, within its discretion receive additional written or oral testimony, and may, but need not hold an additional hearing prior to making a final decision. If the General Council elects to receive additional testimony, it may delay a final decision for an additional thirty (30) days. The General Council may issue a variance subject to any limitations or conditions found appropriate by the General Council.

2. Within ten (10) days of its decision, the General Council shall send a certified letter to the applicant indicating the decision, the grounds for the decision and the *procedure for petitioning for review of an unfavorable decision to the Suquamish General Court.*

d. Appeal

1. *The Suquamish Tribal Court shall have exclusive jurisdiction to review the denial of a variance.* A petition for review shall be filed with the Tribal Court within ten (10) days of receipt of the decision from the General Council, a copy served upon the Tribal Council within five (5) days thereafter.

2. The *Suquamish Tribal Court* when reviewing the denial of a variance shall consider only whether the action of the General Council was clearly erroneous and wholly without a factual basis such as to be a denial of due process, and shall reverse the action of the Tribal Council only when the Tribal Court so finds by clear, congent and convincing evidence.

Section 8. *Limitation on the Tribal Court and Hearing Officer under this Ordinance*

Whenever the Tribal Court or a Hearing Officer takes any action, or performs any function pursuant to this Ordinance each body shall comply with the following provisions:

a. No Judge or Judge pro tem of the Suquamish Tribal Court shall participate in the review of a denial of a variance issued by the Suquamish Tribal Council when the petitioner is related to the Tribal Judge by blood or marriage within six degrees of kinship as computed by the civil law system. In those situations where the Tribal judge is not qualified under the terms of this section the Tribal judge shall disqualify his or herself. Where no Tribal judge of the Suquamish Tribal Court is qualified under this ordinance to hear a particular case, the Chief Judge shall contact the judges of the Tribal court of another Indian tribe, and shall procure from said tribal court a judge to act as a judge pro tem in the specific case.

b. The Hearing Office or Hearing Officer pro tem provided under the Ordinance shall not participate in any manner in the determination of an application for a variance where the applicant is related to the Hearing Office or Hearing Officer pro tem by blood or marriage within six degrees of kinship as computed by the civil law system. In those cases where the Hearing Officer is disqualified under the terms of this section the Tribal Council shall select a Hearing Officer Pro Tem to make recommendations on a specific case.

Section 9. *Adoption*

This ordinance shall become effective upon completion of the following procedure:

a) *The Ordinance shall be presented to a General Council Meeting for its initial approval.*

b) If approved by the General Council this Ordinance shall be presented to a public hearing to be held at a permanent place within the reservation to receive comments, proposed changes or other information relevant to whether this ordinance should be adopted. Any person, group or

corporation may present testimony relating to this ordinance. At least ten (10) days notice shall be provided for said public hearing.

c) *Within ten (10) days following the public hearing held pursuant to Section 8 (b) above, the Suquamish General Council shall meet and either adopt or not adopt this ordinance.* The General Council may after considering the comments and other material received at the public hearing amend this ordinance and adopt said ordinance in its amended form.

Section 10. *Violation*

a. *The Suquamish Tribal Court shall have exclusive jurisdiction to hear and determine any matter arising under this ordinance.*

b. It shall be *unlawful* for any person, corporation, or other entity to *violate any provision of this ordinance. Any person, corporation, or other entity found guilty of violating any provision of this ordinance shall be fined not more than $500* or *sentenced up to six (6) months in jail or both.*

c. The Suquamish Tribe, any person, corporation or other entity may bring an action in the Suquamish Tribal Court to halt, abate or modify the construction of any building, structure or use of real property within the Port Madison Reservation which is in violation of any provision of this ordinance. Any such action may in addition seek damages, and or restoration of the property. The Suquamish Tribal Court may in addition award to the prevailing party a reasonable attorneys fee.

d. Nothing in this ordinance shall be deemed as a waiver of the *sovereign immunity of the Suquamish Tribe authorizing suit against the Tribe in any court other than the Suquamish Tribal Court*, nor shall it be deemed as authorizing a suit for damages against the Suquamish Tribe for any action arising under this ordinance, unless the Suquamish Tribal Council by specific legislative action should authorize such an action for damages.

Section 11. *Severability*

Should any word, section, clause, paragraph, sentence or provision of this ordinance be declared invalid by a court of

competent jurisdiction, such decision shall not affect the validity of any other part of this ordinance which can be given effect without such invalid part or parts.

(Emphasis added)

SUQUAMISH TRIBAL RESOLUTIONS, GUBERNATORIAL PROCLAMATIONS, AND THE SECRETARY OF INTERIOR'S ACCEPTANCE OF RETROCESSION

(1) April 29, 1958 Resolution of Suquamish Tribe asking governor to assume jurisdiction over Port Madison Reservation.

"RESOLUTION OF THE SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION

WHEREAS, Under Public Law 280, the United States has granted to the State of Washington authority to assume criminal and civil jurisdiction over the peoples residing upon Indian reservations within the State of Washington, and;

WHEREAS, the Legislature of the State of Washington, in Chapter 240, Laws of 1957, has bound and obligated the State of Washington to assume such jurisdiction at such time as the people of said reservations, through their proper governing authority shall request the State of Washington to assume such jurisdiction, and;

WHEREAS, the Suquamish Tribe of the Port Madison Reservation is an organized Indian Tribe, and the Suquamish Tribal Council is the recognized governing body of the said Tribe, and;

WHEREAS, the Suquamish Indian people have found the laws of the United States, as applied to Indian territory, and Tribal laws, insofar as such can be effectively enforced, to be inadequate for the protection of the Suquamish Indian people, and they therefore desire that the State of Washington assume criminal and civil jurisdiction over peoples residing upon their reservation and territory, now therefore,

IT IS RESOLVED that the Suquamish Tribal Council hereby requests and expresses its desire that the criminal and civil jurisdiction of the State of Washington be extended to include the prople of the Suquamish Indian Tribe and all persons being and residing upon the Port Madison Indian Reservation, the same being located in Kitsap County, Washington, particularly described as follows:

Established by Treaty of January 22, 1855. Description: Lot 5, 6, 7, E 1/2 E 1/2 Section 9; all lands in Sections 10, 11, 12, 13, 14, 15, 19, 20, 21, 29, 30, 31, 32; S 1/2 Sections 16, 17, 18; Lots 1, 2, 3, Section 16, T. 26 N., R. 2 E., W. M., and Lot 1, Section 6, T. 25 N., R. 2 E., W.M.

And the chairman of the Tribal Council is directed to transmit to the governor of the State of Washington, on behalf of the Tribal Council and the people of the Suquamish Indian Tribe, a true copy of this resolution.

Dated this 29 day of April, 1958.

CERTIFICATION

The above resolution of the Suquamish Tribal Council requesting that the State of Washington assume criminal and civil jurisdiction over persons residing and being upon the Port Madison Indian Reservation, located in Kitsap County, Washington, was duly adopted at a special meeting of the Suquamish Council on the 19th day of December, 1957 by a vote of 21 members for the said resolution and 0 members against the said resolution; and there were present at the said meeting 21 members of which number 15 or more constitute a quorum.

Suquamish Tribal Council

/s/ Charles R. Lawrence
Chairman

/s/ Grace Sigo
Secretary

Approved: May 5, 1958

/s/ M. F. Schwartz
ACTING Superintendent
Western Washington Indian Agency"

(2) May 5, 1958, Letter of Request from Suquamish Tribe to Governor Rossellini for Washington to assume jurisdiction.

"Suquamish, Washington
May 5, 1958

The Honorable Albert D. Rossellini
Governor of Washington
Capitol Building
Olympia, Washington

My Dear Governor Rossellini:

I am transmitting to you a duly adopted resolution of the Suquamish Tribe of Indians of the Port Madison Reservation enacted April 29, 1958, requesting that the State of Washington assume criminal and civil jurisdiction over all of the peoples being and residing on the Port Madison Reservation.

The members of the Suquamish Indian Tribe appreciate this opportunity of requesting this service and respectfully request that you issue the necessary proclamation as soon as possible.

Sincerely yours,
/s/ Charles R. Lawrence
Chairman
Suquamish Tribal Council"

Enclosure

(3) May 15, 1958, Proclamation of Governor Rosellini proclaiming and declaring criminal and civil jurisdiction per (1), (2) and (3) above (Sec. 2, Laws of 1957)

"A PROCLAMATION BY THE GOVERNOR:

WHEREAS, the Suquamish Tribal Council has duly filed with the Governor of the State of Washington a resolution expressing the desire of the suquamish Indian Tribe that its people and lands be subject to the criminal and civil jurisdiction of the State of Washington:

NOW, THEREFORE, I, Albert D. Rosellini, Governor of the State of Washington, by virtue of the

authority in me vested under chapter 240, Laws of 1957, hereby proclaim and declare: That effective July 14, 1958,

The criminal and civil jurisdiction of the State of Washington shall apply to the Suquamish Indian people, their reservation, territory, lands and country, and all persons being and residing therein.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the State of Washington to be affixed at Olympia this fifteenth day of May, A. D., nineteen hundred and fifty-eight.

/s/ Albert D. Rossellini
Governor of Washington

BY THE GOVERNOR:

/s/ Ray J. Yeoman
Assistant Secretary of State"

(4) Jan. 11, 1971, Resolution of Suquamish Tribe per vote of 29 members, declaring intent to return jurisdiction to United States and retain concurrent jurisdiction.

"RESOLUTION OF THE SUQUAMISH TRIBE OF PORT MADISON INDIAN RESERVATION

Whereas, under Public Law 280, the United States of America has granted to the State of Washington authority to assume criminal and civil jurisdiction over the people residing upon Indian Reservations within the State of Washington and

Whereas, the legislature of the State of Washington in Chapter 240, laws of 1957 has bound and obligated the State of Washington to assume such jurisdiction at such time as the people of said reservations, through their proper governing authority shall request the State of Washington to assume such jurisdiction and,

Whereas, the SUQUAMISH Indian people have found that serious confusion exists on jurisdiction of law and order between State and Federal officials concerning law and order on this PORT MADISON INDIAN RESERVATION.

We, the people of PORT MADISON RESERVATION, do hereby make official our intention to return jurisdiction to the United States Government in matters of Law and Order.

As of this date, 11 January, 1971.

Be it further resolved that any legislation of this subject adhere to the following principles:

First:

No jurisdiction be imposed without consent of the tribes involved.

Second:

Tribal government to retain concurrent jurisdiction to the fullest possible extent.

CERTIFICATION

The above Resolution of the SUQUAMISH TRIBE requesting to the State of Washington to relinguish its right to criminal and civil jurisdiction over persons residing and being upon the PORT MADISON INDIAN RESERVATION, located in KITSAP COUNTY, WASHINGTON, was duly adopted at a special meeting of the SUQUAMISH TRIBE on the 10th day of January, 1971. By a vote of 29 members for the said resolution and 0 members against the said resolution.

/s/ Grace Duggan
GRACE DUGGAN
CHAIRMAN, SUQUAMISH TRIBAL COUNCIL

/s/ Evelyn C. Hughes
EVELYN C. HUGHES
SECRETARY, SUQUAMISH TRIBAL COUNCIL"

(5) August 26, 1971, Proclamation of Governor Evans, proclaiming Proclamation of Governor Rosellini null and void and retroceding jurisdiction to United States EXCEPT AS PROVIDED UNDER CHAPTER 36, LAWS OF 1964 (RCW 37.12.010 - 37.12.060, 5 and 6 HEREOF)

"A PROCLAMATION BY THE GOVERNOR:

WHEREAS, on the 15th day of May, 1958, a Proclamation was issued by Governor Rosellini of the State of Washington, proclaiming that "The criminal and civil jurisdiction of the State of Washington shall apply to the Suquamish Indian people, their reservation, territory, lands and country, and all persons being and residing therein"; and

WHEREAS, that Proclamation was issued under the provisions of Chapter 240, Laws of 1957, enacted pursuant to the authority granted the State of Washington by Public Law 280, 67 Stat. 588 (1953) which authorized the extension of law and order to any Indian reservation in the State of Washington when requested by the governing body of the tribe thereof; and

WHEREAS, under the provision of Chapter 36, Laws of 1963, the State of Washington assumed criminal and civil jurisdiction over certain specific matters on all reservations in the state whether requested by the tribes concerned or not; and

WHEREAS, subsequent to the Proclamation of May 15, 1958, the Suquamish Indian people have been confused as to the appropriate jurisdiction for criminal and civil matters between State and Federal officials; and

WHEREAS, on January 11, 1971, the Suquamish Tribe adopted a Resolution expressing their "intention to return jurisdiction to the United States Government in matters of Law and Order," which Resolution was received by me on March 15, 1971;

NOW, THEREFORE, I, Daniel J. Evans, Governor of the State of Washington, do hereby proclaim that Governor Rosellini's Proclamation of the 15th day of May, 1958, proclaiming state jurisdiction over the Suquamish, is hereby revoked and proclaimed null and void.

IT IS FURTHER PROCLAIMED, that any jurisdiction exercised by the State of Washington over the Suquamish Port Madison Indian Reservation except as provided under Chapter 36, Laws of 1963 (RCW 37.12.010-37.12.060), is retroceded to the United States.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the State of Washington to be affixed at Olympia, this 26th day of August, 1971.

/s/ Daniel J. Evans
Governor of Washington"

(6) April 5, 1972, Secretary of Interior of U.S. Notice of Acceptance of Retrocession as offered on August 26, 1971, proclamation of Governor Evans, EXCEPT AS PROVIDED UNDER CHAPTER 36, LAWS OF 1963 (RCW 37.12.010 - 37.12.060 5 and 6 HEREOF)

"Office of the Secretary

PORT MADISON INDIAN RESERVATION

Notice of Acceptance of Retrocession of Jurisdiction

Pursuant to the authority vested in the Secretary of the Interior by executive Order No. 11435 (33 F.R. 17339), I hereby accept as of 12:01 a.m., e.s.t., of the day following publication of this notice in the FEDERAL REGISTER, retrocession to the United States of all jurisdiction exercised by the State of Washington over the Port Madison Indian Reservation, except as provided under Chapter 35, Laws of 1963 (RCW 37.12.010 - 37.12.060), as offered on August 26, 1971, by proclamation of the Governor of Washington.

HARRISON LOESCH,
Assistant Secretary
of the Interior.

April 5, 1972

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37 F.R. 7353 - THURSDAY, APRIL 13, 1972"

(7) THE SUQUAMISH TRIBE PORT MADISON INDIAN RESERVATION RESOLUTION NO. 77-065

WHEREAS the Suquamish General Council is the duly constituted governing body of the Port Madision Indian Reservation by authority of the Constitution and By-Laws for the Suquamish Indian Tribe of the Port Madision Indian Reservation as approved July 2, 1965, by the Under-Secretary of the Interior; and,

WHEREAS under the Constitution and By-Laws of the Tribe, the Suquamish Tribal Council is charged with the duty of protecting the health, security and general welfare of the Suquamish Tribe and all Reservation Residents; and,

WHEREAS the Suquamish General Council recognizes the need to establish procedures for the selection of jurors for the Suquamish Tribal Court System; and,

WHEREAS the Suquamish General Council desires that all Tribal members participate in the judicial process; and,

WHEREAS membership in the Suquamish Tribe is a prerequisite to participate in the jury process,

NOW THEREFORE BE IT RESOLVED, that the Suquamish General Council amends the existing Law and Order Code to all Suquamish Tribal members, regardless of residence, to serve as jurors in the Suquamish Tribal Court and to establish that only Suquamish Tribal Members are eligible to serve as jurors in the Suquamish Tribal Court System.

CERTIFICATION

The foregoing resolution was duly enacted by the Suquamish General Council Meeting this twelfth day of June, 1977, by a vote of 32 FOR and 0 AGAINST. (1 abstention)

BY: /s/ Marilyn A. George
/s/ Marion Boushie

ATTEST:
/s/ Lawrence A. Webster

Marilyn George (date) or Lawrence Webster (date)
Marion Boushie (date)

REGULATIONS OF THE SECRETARY OF INTERIOR CODIFIED IN TITLE 25 OF THE CODE OF FEDERAL REGULATIONS 1973

(1) §11.1 *Application of regulations*

(d) The regulations in this part shall continue to apply to tribes organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

(2) §11.2 *Jurisdiction*

(a) A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in §§ 11.38-11.87NH, when committed by any Indian, within the reservation or reservations for which the court is established, * * *

(3) §52.7 *Adoption*

A constitution and bylaws or amendment shall be considered adopted if a majority of those actually voting vote in favor of adoption provided the total vote cast is not less than 30 percent of those entitled to vote; but no action shall become effective until it is approved by the Secretary.